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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. [redacted] 39

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL.,
Appellants,

vs.

J. MILLARD TAWES, GOVERNOR, ET AL.
Appellees.

JURISDICTIONAL STATEMENT ON APPEAL FROM THE COURT OF APPEALS FOR MARYLAND

ALFRED L. SCANLAN,
1606 Singleton Drive,
Bethesda, Maryland.

JOHN B. WHITE,
12 Church Circle,
Annapolis, Maryland.

SHEA & GARDNER,
734 15th Street, N.W.,
Washington, 5, D. C.
Of Counsel.

JOHNSON, HOWIE,
County Office Building,
Towson, Maryland,
Attorneys for the Appellants.

October 24, 1962

IN THE

SUPREME COURT OF THE UNITED STATES

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION (in behalf of its members), 4907 Redford Road, Bethesda, Montgomery County, Md.; W. F. STRONG, 301 Hillmoor Drive, Silver Spring, Montgomery County, Md.; NEWTON I. STEERS, 6601 River Road, Bethesda, Montgomery County, Md.; JOHN DOHERTY, 12 Revell Street, Annapolis, Anne Arundel County, Md.; BRUCE L. BOWMAN, 1423 Laurel Hill Road, Greenbelt, Prince Georges County, Md.; ANDREW M. BRISTOW, 8168 Glen Gary Road, Baltimore County, Md.; and SAMUEL HOPKINS, 4302 Wendover Road, Baltimore, Md. *Petitioners-Appellants,*

vs.

J. MILLARD TAWES, Governor, State House, Annapolis, Md.; BOARD OF STATE CANVASSERS, State House, Annapolis, Md.; LLOYD SIMPKINS, Secretary of State and Member of the BOARD OF STATE CANVASSERS, State House, Annapolis, Md.; LOUIS L. GOLDSTEIN, Comptroller and Member of the BOARD OF STATE CANVASSERS, State House, Annapolis, Md.; THOMAS B. FINAN, Attorney General and Member of the BOARD OF STATE CANVASSERS, State House, Annapolis, Md.; HOOPER S. MILES, Treasurer and member of the BOARD OF STATE CANVASSERS, State Office Building, Annapolis, Md.; and JAMES LLOYD YOUNG, Clerk, Court of Appeals, and member of the BOARD OF STATE CANVASSERS, Court of Appeals Building, Annapolis, Md.; and BOARD OF ELECTION SUPERVISORS, Anne Arundel County, Court House, Annapolis, Md. *Respondents-Appellees*

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No.

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL,

Appellants,

vs.

J. MILLARD TAWES, GOVERNOR, ET AL,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS FOR MARYLAND

JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the Court of Appeals for Maryland entered on July 23, 1962, with the majority and dissenting opinions announced on September 25, 1962. That judgment affirmed a decree of the Circuit Court of Anne Arundel County, Maryland (sitting as a court of equity), which had found Section 2 of Article III of the Maryland Constitution not to be in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. The trial court's decree did not grant the declaratory and injunctive relief sought by the appellants in their bill of complaint. The relief requested was based in part on appellants' contentions that the representation now provided for in the Maryland State Senate

in particular, and in the Maryland General Assembly as a whole, constitutes an invidious discrimination and an unconstitutional dilution of appellants' voting rights, as well as those of other citizens and eligible voters of Maryland similarly situated, in violation of Section 1 of the Fourteenth Amendment. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the instant appeal, and that a substantial question is presented.

Opinions Below

The opinion and judgment of the Court of Appeals for Maryland has not yet been officially reported. It is set forth in Appendix A hereof. The pertinent opinions and decrees of the Circuit Court for Anne Arundel County have not been officially reported, but are printed in Appendix B hereof.[1] An earlier opinion of the Court of Appeals for Maryland in this case, issued on April 25, 1962, is reported at 228 Md. 412, 180 A. 2d 656.

Jurisdiction

Appellants' suit is based on Section 1 of the Fourteenth Amendment. It seeks declaratory and injunctive relief against violations of rights of suffrage arising out of the conduct of future elections for membership in the Maryland General Assembly on the basis of the malapportioned representation now provided in the State Senate by virtue of Section 2 of Article III of the Maryland Constitution. Appellants also complain of the unconstitutional dilution of their rights of suffrage which results from the unreasonable representation now provided for in the General Assembly as a whole, both by virtue of the aforesaid provision of the

[1] Judge Duckett's opinion of June 28, 1962 was unofficially reported in the *Daily Record*, July 2, 1962, p. 3. His opinion of May 24, 1962, also was unofficially reported in the *Daily Record*, May 28, 1962, p. 1.

Maryland Constitution and by Chapter I of the Acts of the 1962 Special Session of the Maryland General Assembly, approved May 31, 1962. Art. 40, Sec. 42, Code of Md. (1962 Supp.).

On June 28, 1962, the Court of Appeals for Anne Arundel County held that Section 2 of Article III of the Maryland Constitution was not invalid under the Fourteenth Amendment, and refused the declaratory and injunctive relief sought in appellants' bill of complaint. The Chancellor's ruling was appealed to the Court of Appeals for Maryland. That Court affirmed his decree on July 23, 1962, in the form of a *per curiam* order, with three of the seven judges dissenting therefrom. A timely motion for reargument was denied without opinion in an order dated September 11, 1962. The majority and two dissenting opinions of the Court of Appeals for Maryland were announced on September 25, 1962. Appellants filed their notice of appeal on September 28, 1962. The jurisdiction of this Court to review the judgment below by direct appeal is conferred by 28 U.S.C. 1257(2) and 28 U.S.C. 2101(c). The following representative decisions sustain the jurisdiction of this Court to review the judgment on appeal in this case. *Williams* v. *Bruffy*, 96 U. S. 176, 183; *King Mfg. Co.* v. *Augusta*, 277 U. S. 100, 104; *Torcaso* v. *Watkins*, 367 U. S. 488, 489; and *Scholle* v. *Hare*, 369 U. S. 429, rehearing denied, 370 U. S. 906.

Questions Presented

1. Are the appellants and other citizens and eligible voters who reside in the five most populous subdivisions of the State of Maryland being subjected to invidious discrimination and unreasonable dilution in the exercise of their rights of suffrage, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, through the representation afforded them in the

Maryland General Assembly by Section 2 of Article III of the Maryland Constitution? This provision permits the five most populous political subdivisions, containing in excess of 76% of the population of Maryland, only 34% of the total membership of the State Senate, and allows a minority of 14% of the population of the State residing in less populous political subdivisions to elect a majority of the members of the Maryland State Senate.

2. Are equal protection and due process of law, as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States, being denied appellants and other citizens and voters of Maryland similarly situated, by the combined total representation provided for in both Houses of the Maryland General Assembly? The citizens and eligible voters residing in the five most populous subdivisions of the State, and comprising over 76% of Maryland's population, by virtue of Art. 40, Sec. 42, of the Maryland Code, and Article III, Section 2, of the State Constitution, are afforded only 55% and 34%, respectively, of the present membership of the Maryland House of Delegates and State Senate.

Statutes Involved

Section 1 of the Fourteenth Amendment to the Constitution of the United States, Section 2 and former Section 5 of Article III of the Maryland Constitution, and Chapter 1, Acts of the 1962 Special Session of the Maryland General Assembly, approved May 31, 1962, now Art. 40, Sec. 42, Code of Md. (1962 Supp.), are set forth in Appendix C hereof.

Statement

The appellees first demurred to the allegations of the bill of complaint shortly after it was filed in August, 1960. In its first decision in this case, the Court of Appeals for

Maryland overruled the demurrers. 228 Md. 412, 180 A. 2d 656. Appellees' subsequent answers raised no disputed questions of material fact. Following appellants' motion for summary judgment, the case was decided by the trial court exclusively upon the pleadings and exhibits filed and argument of counsel, without the taking of testimony or the introduction of evidence. The undisputed material facts may be summarized as follows:

1. *Present Population of the State and Existing Representation in the Maryland General Assembly.* According to the official census, the 1960 population of Maryland was 3,072,999. At that time, the combined population of the five most populous subdivisions of Maryland, which are the Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges, and the City of Baltimore, was 2,312,485. At present, slightly more than 76% of the population of Maryland live in these five most populous political subdivisions, while a little less than 24% of the population reside in the remaining 19 counties of the State.

Under Section 2 of Article III of the Maryland Constitution, each of the 23 counties of the State is given one Senator, with each of the 6 legislative districts of the City of Baltimore also entitled to one Senator. Until the Circuit Court for Anne Arundel County declared it to be in violation of the Fourteenth Amendment and null and void, Section 5 of Article III of the Maryland Constitution had prescribed the representation to be enjoyed in the House of Delegates by the various political subdivisions. The specific number of Delegates to which each political subdivision was entitled was expressly set forth in that Section of the Maryland Constitution. Temporary legislation, passed at a special session of the Maryland General Assembly held in May, 1962, has replaced the voided Constitutional provision. Art. 40, Sec. 42, Code of Md. (1962

Supp.). Representation in the House of Delegates now is expressly provided for in the statute which was enacted at the special session. The representation prescribed by the present statute has remained as previously authorized by Section 5 of Article III of the State Constitution, with the following exceptions: Baltimore County now has 13 instead of 6 Delegates; Montgomery and Prince Georges now have 10 Delegates each instead of 6 each; Anne Arundel County now has 7 instead of 6 Delegates; and the Third Legislative District of the City of Baltimore now has been given 8 Delegates and the Fifth Legislative District, 7 Delegates, rather than the 6 Delegates to which each of those two Districts formerly had been entitled under Section 5 of Article III of the State Constitution.

The four most populous counties and the six legislative districts of the City of Baltimore have one member each in the Maryland State Senate. This constitutes approximately 34% of the representation in the Senate. The remaining 19 counties have one member each, or approximately 66% of the representation provided for in the upper chamber of Maryland. Prior to the filing of this suit, and until the enactment on May 31, 1962 of temporary reapportionment legislation at a special session of the General Assembly, the five most populous subdivisions of the State were allotted 60 Delegates out of the 123 members of the House of Delegates. The 19 less populous counties were given 63 Delegates, or 51% of the total membership of the House of Delegates. At the present time, the five most populous subdivisions are afforded 79 Delegates, or 55% of the total membership of the House of Delegates, while the remaining less populous counties continue to have 63 Delegates, which now makes up 45% of the total membership of 142.

2. *Discrepancies of Representation in the Maryland State Senate.* Less than 15% of the population of Maryland can

elect a majority of the State Senate. One Senator from Baltimore County, with a population at the present time of approximately 500,000 people, is elected by more people than are required to elect a majority of the entire State Senate. If representation were based strictly on the 1960 population of Maryland, each Senator would represent approximately 106,000 people. On that basis, a citizen's vote for a State Senator in the most under-represented populous county of Maryland is worth only 3% of the vote of a resident from the most over-represented and least populous county.

The four most populous counties, with a combined population now very close to 1,500,000, and constituting nearly 47% of the total population of the State, enjoy less than 14% of the representation now provided in the State Senate by virtue of Section 2 of Article III of the Maryland Constitution. As of January 1, 1963, population projections indicate that Montgomery and Prince Georges Counties will have a combined population of approximately 800,000, or 25% of the State total, yet will have less than 7% of the total representation in the Senate. The City of Baltimore, with a little over 900,000 people, has 6 State Senators, while the four most populous counties previously referred to, with nearly 1,500,000 people, have a combined total of 4. Substantial discrepancies in Senate representation also exist within the class of the less populous political subdivisions. For example, one county with a 1960 population slightly in excess of 90,000 people has 1 State Senator, while another county with a population of less than 17,000 also has 1. The Senator from Montgomery County represents more than 22 times as many persons as the Senator from Kent County. Each year the population of Montgomery County is increasing more than the entire present population of Kent County.

3. *Present Representation in the House of Delegates.* Immediately after a decision rendered on May 24, 1962 by

the Circuit Court for Anne Arundel County, declaring Section 5 of Article III of the Maryland Constitution to be in violation of the Fourteenth Amendment, a special session of the General Assembly of Maryland was convened. On May 31, 1962, the special session passed stopgap legislation, adding 19 new Delegates to the House of Delegates, temporarily raising its membership to 142.[2] As stated, Baltimore County was allotted 7 of the new Delegates, Montgomery County and Prince Georges, 4 each, Anne Arundel County, 1, the Third Legislative District of the City of Baltimore, 2, and the Fifth Legislative District, 1 additional Delegate. Before the enactment of this special legislation, the maximum dilution in voting rights which had existed among the political subdivisions in the House of Delegates was approximately 12 to 1. This maximum has now been reduced to 6 to 1. The five most populous political subdivisions, in which live in excess of 76% of the population, at present have 55% of the total representation in the House of Delegates. Unlike the United States House of Representatives, where only 5 out of 436 Congressional seats, or 1%, fail to meet the the minimum average population requirement, some 33, or 23%, of the total of 142 seats in the House of Delegates are permitted the less populous political subdivisions apart from the 30 seats to which they are entitled on a straight population basis. On any basis of a minimum population ratio requirement, these areas would not be entitled to those 33 Delegates.

The four suburban counties, with approximately 47% of the State's population, are given a little less than 28% of the representation in the present 142 member House of

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[2] Art. 40, Sec. 42, Code of Md. (1962 Supp.). Unless superseded by an amendment to the Maryland Constitution, the temporary legislation enacted by the special session will automatically expire on January 1, 1966. An amendment requires that three-fifths (3/5) of each house of the General Assembly approve the referendum before it can be submitted for a vote of the electorate.

Delegates. If representation were based on population, but permitting at least one Delegate for every County, the five most populous subdivisions would be entitled to a minimum of 105 Delegates out of the 142 for which provision was made by the Act of May 31, 1962, rather than the 79 seats they now have. The 19 less populous counties, on the other hand, would be entitled to no more than 30 Delegates, rather than the 63 which they now have.

4. *Revenues Contributed and State Funds Returned.* In Maryland, significant portions of the revenue collected by the State from various types of taxes are returned to the local political subdivisions on the basis of equalization formulae enacted by the General Assembly. Under most of these formulae, the five most populous political subdivisions contribute proportionately greater tax revenues, yet receive proportionately less funds back from the State, than do the less populous political subdivisions. For example, in 1959 under the equalization formula applying to return of funds collected through the motor vehicle fuel tax, Anne Arundel, Baltimore, Montgomery and Prince Georges, in which approximately 46% of the motor vehicles of Maryland are registered, received back approximately 12% of the tax revenues returned by the State.

5. *Futile Efforts to Have the Legislature Reapportion Itself in the Absence of a Controlling Court Decision.* Neither in the Maryland Constitution nor in the statutes is there any provision for reapportioning the General Assembly. The Maryland Constitution does not provide for the initiative. For an amendment to the State Constitution to be submitted to the people on referendum, a vote of three-fifths of both houses of the legislature is required.[3] Aside from the limited and temporary reapportionment of the House of Delegates enacted at the 1962

[3] Art. XIV, Section 1, of the Maryland Constitution.

special session, following the decision of the trial court in striking down Section 5 of Article III of the Maryland Constitution, since 1867 all efforts to obtain a reapportionment of the General Assembly, with two other exceptions, have been futile. In 1900, the City of Baltimore, because of its expanding population, was given an additional State Senator and an additional legislative district, making a total of 4; 2 more Senators and 2 more legislative districts were added to Baltimore's representation in 1922. Apart from these increases of Senate representation for the City of Baltimore, membership in the Maryland State Senate remains as provided for in the Constitution of 1867. Until 19 Delegate seats were created and distributed among the five most populous political subdivisions at the 1962 special session of the Maryland General Assembly, representation in the House of Delegates was authorized on the basis of a limited population formula adopted in the Constitution of 1867. However, a ceiling was imposed in 1950 which froze representation in the lower House on the basis of representation established in reliance on the Federal census of 1940. The purpose of this amendment was to prevent the smaller counties from continuing to receive increased representation at the further expense of the larger political subdivisions which, under the 1867 formula, were not entitled to any more than 6 Delegates once their population had reached 55,000, no matter how much it might increase thereafter.

From 1951 through 1960, 11 proposals were introduced at the Maryland General Assembly to reapportion only the House of Delegates. None were enacted. Nor did any move so far as to reach a final vote on the merits. Nearly a dozen reapportionment amendments were introduced at the 1961 and 1962 sessions of the Maryland General Assembly. None of these were passed.

While the Constitution of Maryland provides that the General Assembly is to provide for "taking the sense of the people" in regard to calling a constitutional convention every twenty years,[4] no constitutional convention has been convened since 1867. A constitutional convention would have the power to propose amendments to the Maryland Constitution, including amendments to reapportion representation in the General Assembly. Although in November, 1950, the electorate approved the calling of a constitutional convention by a vote of 200,439 to 56,998, the General Assembly has consistently declined to convene one. Legislation proposing that a convention be summoned was introduced at sessions of the General Assembly held in 1951, 1954, 1955, 1957, 1960, 1961 and 1962. None of these proposals were enacted. One convention bill passed the House of Delegates in the closing days of the 1961 legislative session. However, after legislators from the less populous subdivisions had attacked the proposal as a "frightening device" to secure reapportionment, the convention bill was defeated in the State Senate by a vote of 17 to 11, all the Senators but one from the less populous counties voting against it.

6. *Proceedings Below.* Appellants filed their bill of complaint in the Circuit Court for Anne Arundel County, Maryland on August 12, 1960. They sought a declaratory judgment that the existing representation as then provided in the Maryland House of Delegates and State Senate by virtue of Sections 2 and 5 of Article III of the Maryland Constitution, violated Section 1 of the Fourteenth Amend-

[4] Art. XIV, Section 2, of the Maryland Constitution. Representation in a constitutional convention, if the legislature finally did convene one, would be on the same malapportioned basis as now exists in the General Assembly itself.

ment.[5] In addition to seeking declaratory relief, appellants asked for injunctive relief against the conduct of the 1962 elections to the Maryland General Assembly "and thereafter" (R. 20-21).

Appellees' demurrers were sustained by the trial court on February 21, 1961 on the grounds that issues presented raised political questions beyond the jurisdiction of the Court to decide. On appeal to the Court of Appeals for Maryland, this first decision of the Chancellor was reversed, and the case remanded for determination of the Federal questions presented. 228 Md. 412, 180 A. 2d 656. Upon remand, and after the appellees had answered the bill of complaint, but had not disputed any of its material allegations, the case was again heard by the trial court on appellants' motion for summary judgment. On May 28, 1962, the Chancellor entered an order declaring Section 5 of Article III of the Maryland Constitution, which provided for representation in the House of Delegates, to be in violation of the Fourteenth Amendment and null and void. (App. B, p. 74). However, he attempted to reserve judgment with respect to the constitutionality of the representation provided in the Maryland State Senate by virtue of Section 2 of Article III of the Maryland Constitution. Appellants took an appeal from the May 28, 1962 decision on the day it was issued (R. 120). The Court of Appeals then directed that the lower Court promptly determine the issue of the constitutionality of Section 2 of Article III. On June 28, 1962, the Circuit Court for Anne

[5] Appellants also contended that the failure to reapportion the Maryland General Assembly violated certain provisions of the Maryland Constitution and the Maryland Declaration of Rights. These issues of State law are no longer in the case, *Md. Comm. for Fair Rep.* v. *Tawes*, 228 Md. 412, 425, 180 A. 2d 656, 662. Since there were individual plaintiffs, appellees' challenge to the standing of the Committee plaintiff was resolved in favor of the latter's standing to sue, 228 Md. 412, 420 fn. 5, 180 A. 2d 656, 660 fn. 5.

Arundel County issued a decree and filed an opinion holding that the present representation in the Maryland State Senate did not violate the Fourteenth Amendment. Appellants immediately appealed to the Court of Appeals for Maryland.[6]

The Court of Appeals heard the case in a special session held on July 23, 1962. In the afternoon of that day, the Court issued a *per curiam* order, with three judges dissenting, affirming the judgment of the trial court. A timely motion for reargument was denied on September 11, 1962. On September 25, 1962, the Court filed its opinion, three judges dissented, and two dissenting opinions were filed, one written by Chief Judge Brune, the other by Judge Prescott (App. A, pp. 37-63).

7. *How the Federal Question Was Presented.* Appellants' claims that rights of suffrage guaranteed them by the Fourteenth Amendment were being violated by elections to the General Assembly conducted on the basis of the representation provided both in the Maryland House of Delegates (R. 11) and in the State Senate (R. 11), as well as by the legislature's failure to reapportion the General Assembly as a whole (R. 20), were expressly asserted in their bill of complaint, and again made in their motion for summary judgment (R. 118). These contentions of law were disputed, first in the demurrers (R. 47), and then in the answers filed by the appellees (R. 130-131). Following Judge Duckett's decree of May 28, 1962, appellants promptly appealed (R. 120). After the Court of Appeals remanded the case to the trial court for his prompt determination of the Senate question, the case was once more heard by the lower court. At this second hearing,

[6] Appellant's earlier appeal of the trial court's decision of May 28, 1962 was aborted when the Court of Appeals remanded the case to the Chancellor, with directions to determine the Senate question promptly (R. 121).

appellants also contended both in brief and oral argument in support of their pending motion for summary judgment that population constitutionally could not be disregarded as a basis for representation in the State Senate, but if it could, then their rights of representation in the Maryland General Assembly as a whole were being violated, with equal protection and due process of law, as guaranteed by Section 1 of the Fourteenth Amendment, thereby being denied them.

On appeal to the Court of Appeals for Maryland from the trial court's decision of June 28, 1962 (App. B, p. 75), appellants once more contended, both in their briefs and oral argument, that the representation provided in the Maryland State Senate by virtue of Section 2 of Article III of the Maryland Constitution was in violation of the Fourteenth Amendment. Alternatively, they argued that if the lower court was correct in holding that population could be completely ignored as a basis for representation in the Maryland State Senate, then the appellants' rights of suffrage and representation in the General Assembly as a whole were being violated in a manner prohibited by Section 1 of the Fourteenth Amendment. Appellees resisted both of these contentions. They also argued that appellants had waived their right to question the constitutionality of representation in the General Assembly as a whole because of their failure to challenge specifically the stopgap reapportionment of the House of Delegates through the temporary legislation which had been enacted at the May 1962 special session of the Maryland General Assembly.[7] The Court below sustained the Chancellor's decision that population need not be taken into account in the composition of the Maryland State Senate (App. A, p. 37.) Impliedly at least, it also rejected appellants' alternative contention that the representation now afforded

[7] Article 40, Sec. 42, Code of Maryland (1962). See fn. 2, *supra*.

residents of the more populous political subdivisions in the General Assembly as a whole offends Section 1 of the Fourteenth Amendment (App. A., p. 38).

The Questions Are Substantial

The issues raised on this appeal are of grave and enduring importance to all branches of the Maryland State Government and to all its citizens. Fundamentally, the question is whether the State is providing in the composition of the Maryland General Assembly the constitutional minimum of representative government and reasonable distribution of voting rights required by the Fourteenth Amendment. The importance of the issues presented, however, transcend the boundaries of the State of Maryland. They bear upon the operation of state government in practically all of the States of the Union. It is not easy to contemplate constitutional issues more fundamental than those raised in this appeal. Their determination, one way or another, will have a definitive, far reaching, and long enduring impact on the nature, scope and direction of state government for generations to come.

The importance of the issues presented in the instant case requires that they be authoritatively dealt with by this Court and no other. The need for this Court to speak decisively is accentuated by the directly conflicting results which have been reached in some of the lower State and Federal courts. Plainly, the Fourteenth Amendment cannot require one thing of Michigan, but not of Maryland. The divergent decisions of the lower courts on the grave constitutional questions surrounding attempts to invoke the Fourteenth Amendment against a grossly malapportioned legislature should be superseded by the final and controlling determination of this Court.

Appellants believe that the error of the Court below in deciding the issues adversely to the appellants is as obvious as the importance of those questions is clear. If the decision of the Court below is permitted to stand, then this Court's ruling in *Baker* v. *Carr*, 369 U.S. 186, may fairly be regarded as an exercise in futility, mere judicial jousting about jurisdiction and justiciability. Thus interpreted, the *Baker* decision will have no permanent effect on substantive constitutional law, save to permit the continued existence of the nationwide evil of gross malapportionment, at the curtailment or elimination of which many had understood that historic ruling to have been directed.

If it is true that what was thought to be the basic thrust in *Baker* v. *Carr*, *supra*, can be blunted or circumvented on the basis of the rationale assigned by the majority of the Maryland Court of Appeals in reaching the decision appealed here, then the struggle for the revival of representative government in State legislatures all over the country might as well be abandoned. If gross malapportionment in either one or both houses of a State legislature is to be judged immune from the requirements of the Fourteenth Amendment by virtue of the fact that it has long existed, or because it can be superficially rationalized as constituting a system of Government thinly analagous to the structure of the United States Congress, then any future efforts to obtain even reasonably fair representation in the legislative chambers of the States are doomed to failure. Absent a controlling decision by this Court making it clear that *Baker* v. *Carr* was intended to achieve more than to establish a procedural or jurisdictional point, the invidious discrimination in rights of suffrage which, for a while, escaped reform through the temporary refuge provided by the "political question" doctrine, will continue unabated throughout the United States.

Appellants state below in more detail why they believe that the constitutional questions presented on this appeal are substantial and should be considered and resolved by this Court.

A. *The Importance of the Constitutional Issues Involved.* Upon the determination of the Constitutional issues raised by this appeal will rest the future course of representative government in the State of Maryland. If the closely divided decision of the Court below, holding that population can be completely disregarded in the representation provided in the State Senate, is allowed to stand, an ever diminishing minority of the population of Maryland will have been permitted the perpetual right, through its position of unnatural preference and power in the Maryland State Senate, to thwart any legislation introduced in the Maryland General Assembly which the representatives of the ruling minority may oppose. This will hold true even in those cases where an overwhelming majority of the people of the State would prefer the enactment of legislation opposed by the controlling minority. The Court of Appeals for Maryland, therefore, was not far from the mark when it stated at the outset of its first opinion in this case:

> "In its entire history, this Court has seldom, if ever, been called upon to decide a case of greater, or more far-reaching, importance than the case at bar. It involves the composition and proper organization of the State Government itself, and the correlative duties and responsibilities of the coordinate branches thereof. The problem calls for the best efforts of all three branches of the State Government in order to furnish to the people of Maryland, without the uncertainties of an interregnum and its attendant risk of chaos,

an orderly and continuous system of self-government that will not violate any of the provisions of the Maryland or Federal Constitutions."[8]

The injustice and the unconstitutional dilution of rights of suffrage, for relief against which appellants now have come to this Court, have long existed in Maryland. Nearly thirty-five years ago, the acidulous H. L. Mencken was provoked to lament:

> "The yokels hang on because old apportionments give them unfair advantages. The vote of a malarious peasant on the lower Eastern shore counts as much as the votes of twelve Baltimoreans. But that can't last. It is not only unjust and undemocratic; it is absurd."[9]

While appellants regret Mencken's lack of charity, they equally regret his conspicuous failure as a prophet in this instance. Unfortunately, with the exception of a mild reapportioning of the House of Delegates achieved at the May 1962 special session of the General Assembly, the unjustified political preference bestowed on a small minority of the voters of this State through a malapportioned legislature, especially the Senate thereof, not only has lasted, but has increased since Mencken's bitter outburst. True, the principal victims of what has been labeled "Barnyard Government" in Maryland may no longer be the voters of the City of Baltimore, but are now the partially disfranchised inhabitants of the suburban counties. Still, no one can dispute the fact that minority rule in the General Assembly of Maryland has not been shaken, much less toppled. In the Maryland Senate, the vote of one resident

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[8] *Maryland Committee for Fair Representation* v. *Tawes*, 228 Md. 412, 417, 180 A. 2d 656.

[9] *Baltimore Evening Sun*, July 23, 1928, p. 15.

of the lower Eastern Shore now counts as much as the votes of thirty-two residents of Baltimore County! What Mencken thought could not last because of its absurdity continues to exist, to grow more absurd, and to an even greater extent, to deny the constitutional rights of those against whom the system discriminates.[10]

Apart from what some might consider merely the abstract injustice inherent in the unfair apportionment of representation which now prevails in the Maryland General Assembly, practical consequences ensue to the disadvantage of the partially disfranchised voters of the State, for whom the appellants believe they speak. For example, the record is clear that the voters and taxpayers of the City of Baltimore and the suburban counties are being discriminated against, both with respect to the revenue contributed to the State as taxes, and with respect to funds received back from the State. (R. 8, 11). This financial discrimination results from the unfair equalization formulae which control the manner and amount of the return of State funds to the local political subdivisions. These formulae, it need hardly be stated, were put into the statutes by the rural minority which has so long dominated the Maryland General Assembly. They resist, to the effective utmost, all changes in the equalization formulae which might have the effect of returning any reduced share to the less populous political subdivisions.

In Maryland, malapportionment has an additional and singularly adverse consequence. It supplies the basis for the unfair unit rule system of voting which prevails at the primary election of State-wide officials, including the Governor, United States Senator, Attorney General and Comp-

[10] *Lucas, Barnyard Government in Maryland*, Reporter Magazine, April 12, 1962, p. 31.

troller.[11] Under this undemocratic, rotten borough system, a candidate for one of those offices can be nominated only if he receives a majority of unit votes, which are based on the representation a county or political subdivision enjoys in the General Assembly. Three times in twelve years, a candidate for State-wide office receiving a majority of the popular votes cast in a primary has been denied the nomination because of the operation of the unit rule. Gross malapportionment in Maryland, therefore, corrodes more than the General Assembly; it touches also the executive branch. Its operation places aspiring candidates for State-wide offices from the more populous political subdivisions under an artificial and completely unjustified handicap.[12]

Important as the issues in this case are to the present and future voters of Maryland, they reach beyond the boundaries of the Free State. A recent summary reveals that as the summer of 1962 drew to a close, more than 30 reapportionment cases were pending in the courts of 31 States of the Union. *New York Times*, August 28, 1962, p. 18; *Wall Street Journal*, August 9, 1962, p. 7; see also, *The Municipal Attorney*, Vol. 3, No. 5, May, 1962, p. 67, *et seq.* This plethora of pending cases constitute another compelling reason why there should be an authorita-

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[11] Art. 33, Secs. 79 and 80, Code of Md. (1957). The recent stop-gap reapportionment of the House of Delegates expressly avoided any similar revision of the unit rule requirement. Art. 40, Sec. 42(i), Code of Md. (1962 Supp.).

[12] Should this Court sustain the lower court's decision in the Georgia unit rule case, *Sanders* v. *Gray*, 203 F. Supp. 158 (N.D. Ga., 1962), prob. juris. noted and motion to advance pend., 370 U.S. 921, elimination of the inequities inherent in the Maryland unit rule system might be achieved independently of a reasonable reapportionment of the General Assembly. A suit has been filed in the Circuit Court for Anne Arundel County, Maryland, challenging the constitutionality of the Maryland unit rule system, *John Doe, et al.* v. *Richard Roe, et al.*, Equity No. 14986. No further proceedings have taken place since the filing of the bill of complaint on May 8, 1962.

tive determination by this Court as to the standards which control and mark out where constitutional legislative discretion ends and where gross or unconstitutional malapportionment begins.

The epidemic of reapportionment cases which followed this Court's historic decision in *Baker* v. *Carr*, 369 U. S. 186, reflects more than pent up dissatisfaction with the bare injustice or inequity of malapportionment in legislative representation which produces unreasonable dilution in the value of voting rights as between citizens of the same State. Rather, the outpouring of recent litigation reflects a revived hope on the part of the residents of the urban and suburban areas of the various States that at last they may have some fair opportunity to break what has been accurately called "the rural stranglehold" on State legislatures.[13] The decay of large cities, and the unprovided for expansion of suburban areas, financial and planning crises in education, housing, transportation, water, sewage and urban redevelopment are the unpleasant hallmarks of almost every metropolitan area in the United States.[14] These current and common vicissitudes of present urban and suburban existence are, in large measure, the consequence of unrepresentative, rurally dominated, State governments, and the neglect and indifference which the legislators from the less populous areas manifest toward the problems which beset their fellow citizens residing in the urban and suburban areas of a state.[15]

It may be that, despite its decision in *Baker* v. *Carr*, *supra*, this Court ultimately will find nothing in the Fourteenth Amendment which prevents the continuation of

[13] Lerner, America as a Civilization, 342 (1957).

[14] *Lewis, Legislative Apportionment in the Federal Courts*, 71 Harv. L.R. 1057, 1058 (1958).

[15] *Harvey, Reapportionment of State Legislatures—Legal Requirements*, 17 Law and Contemp. Probs., 364, 376 (1952).

built-in minority rule in the legislative chambers of the States. However, if that judgment is to be the final outcome of the struggle for judicial relief from gross malapportionment, it is a determination that only this Court should make. Neither the Maryland Court of Appeals, the Michigan Supreme Court, nor any other lower State or Federal court of the country should be permitted the last word, especially since they do not seem to agree as to what it should be. Appellants, therefore, believe the importance to Maryland and to the Nation of the constitutional issues presented on this appeal, and the necessity for this Court to pass upon them, to be self-evident. As the Solicitor General recently put it:

> "*Reapportionment.* It is hardly necessary to argue the importance and divisiveness of this issue. The character of the legislative apportionment determines the basic nature of our government. If voting strength in a legislature is apportioned according to population or the number of qualified voters in any district, there is in truth adherence to the principle of majority rule, but perhaps at the expense of minority interests. Where a city vote is worth one-twentieth or one-fiftieth the vote of a rural legislator, government is by the minority. Nor is this just a matter of principle. The failure of State governments to meet modern problems and majority needs, especially the burgeoning problems of urban and metropolitan regions, is partly the result of the fact that the majority of the people, even large majorities, do not control the legislatures. The failure leads to public cynicism, disillusionment and loss of confidence. Reapportionment would be one of the best methods of encouraging vigorous and re-

sponsible State and local government and thus reversing the tendency of the cities to look to the national government for progressive solutions.[16]

B. *Conflicting Decisions Among the Lower Federal and State Courts.* Appellants argued below that the Fourteenth Amendment does not permit population to be completely disregarded in the composition of the Senate of the Maryland General Assembly, especially in view of the fact that the lower House thereof is only slightly weighted in favor of population. The Court of Appeals for Maryland in a 4 to 3 decision has held otherwise. These are issues which this Court has not squarely considered, much less determined. Cf. *Scholle* v. *Hare*, 369 U.S. 429. Moreover, the lower Federal and State courts of the Country which have had occasion to pass upon the question of whether population may be disregarded in at least one house of a State legislature, are divided on that particular issue. For instance, after this Court remanded *Scholle* v. *Hare*, 360 Mich. 1, 104 N.W. 63, vacated and remanded 369 U.S. 429, the Supreme Court of Michigan held, in a 4 to 3 decision, that rights possessed under the Fourteenth Amendment by eligible voters of the urban districts of Michigan were violated by the representation provided in the Michigan State Senate through provisions of the Michigan Constitution, where the lower house is based on population but where slightly in excess of 30% of the population now can elect a majority of the Senate, and where the maximum discrepancy in the representative ratio of senatorial districts reaches 13 to 1. 367 Mich. 176, 116 N. W. 2d 350. We will not argue here the reasons, some

[16] *Cox, The Nature of Supreme Court Litigation*, address before the Federal Bar Association, Washington, D. C., September 8, 1962, pp. 4-5; also partially reported in the *Washington Post & Times Herald*, September 9, 1962, p. A-25.

of which are touched upon in Chief Judge Brune's dissenting opinion below (App. A, p. 46), why appellants believe that, if the Michigan case has been decided correctly, then the case for a reversal of the decision of the Court of Appeals for Maryland is even more compelling.[17]

A three-judge Federal Court in Oklahoma has struck down all of Oklahoma's reapportionment laws, pertaining both to the Oklahoma Senate and to the lower house of the legislature. *Moss* v. *Burkhart* —— F. Supp. —— (W.D. Okla., 1962). In Oklahoma, under the legislation voided by the Federal Court, 26% of the population was required to elect a majority of the State Senate, while the maximum discrepancy in representation between Senatorial districts was about 30 to 1, or close to the maximum dilution found in the instant case, which is 32 to 1.

Following the remand of this Court's decision in *Baker* v. *Carr*, a three-judge Federal Court of the Middle District of Tennessee rejected the meagre reapportionment measure through which the Tennessee legislature had attempted to comply with what the Fourteenth Amendment requires. *Baker* v. *Carr*, —— F. Supp. —— (M.D. Tenn., 1962). In disapproving the Tennessee reapportionment legislation, the Court observed that should the State Senate "be apportioned on an equitable basis [though] not fully related to voting strength, it would be necessary to apportion the House of Representatives on the basis of number of qualified voters alone," without affording any minimum representation in the lower House based merely on existence as a county.

Again, in *Sims* v. *Frink*, —— F. Supp. —— (M.D. Ala., 1962), a Federal court refused to accept a proposed reapportionment of the Alabama legislature through a so-

[17] A petition for certiorari in *Scholle* v. *Hare*, now captioned *Beadle* v. *Scholle*, No. 517, October 1962 Term, was filed on October 15, 1962.

called Federal plan of representation, under which the Alabama House would have been based on population, while the Senate would have been composed of one Senator from each of the 67 counties of Alabama, without regard to population. Under the proposed constitutional amendment, 19.4% of the population of Alabama would have had majority control of the State Senate. The Court then went on to issue an opinion ordering the temporary reapportioning of both the Alabama Senate and House of Representatives on a basis related to population.[18]

On the other hand, a three-judge District Court in the Northern District of Georgia recently divided 2 to 1 over the question of whether the Fourteenth Amendment was satisfied by a proposed constitutional amendment under which the Georgia Senate would be apportioned exclusively according to population, while the composition of the House of Representatives would allow one member from each of the 159 counties of the State. The majority apparently were of the opinion that this arrangement comported with the Federal Government's basic structure, with the House of Representatives based on population and the Senate on geography. For that reason, the Court felt that the proposed amendment could not be classified as the invidious discrimination which is prohibited by the Fourteenth Amendment. Circuit Court Judge Tuttle dissented. *Toombs, et al* v. *Fortson, et al*, —— F. Supp. —— (N.D. Ga., September 5, 1962).

A three-judge Court for the Southern District of Florida has ruled that a proposed constitutional amendment for the reapportionment of the Florida legislature, under which

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[18] On August 25, 1962, a Justice of this Court refused to grant a stay of the decision in *Sims* v. *Frink*, pending the filing of a petition for certiorari. *Washington Post & Times Herald*, August 26, 1962, p. A-7. An appeal was filed in this Court on October 12, 1962, *Reynolds* v. *Sims*, No. 508, October, 1962 Term.

eight new Senators and forty new Representatives were to be created, and, for the most part, to be allotted to the more populous political subdivisions of Florida, if approved by the voters, would satisfy the requirements of the Fourteenth Amendment. *Sobel* v. *Adams*, —— F. Supp. —— (S.D. Fla., September 5, 1962). Under the Florida plan, representation in the House of Representatives is to be apportioned by a formula "in which population is heavily weighted." Because of that, the Court was of the view that "population need not be a major factor in the apportionment of the Senate," although it conceded that the apportionment in the upper house still must be made "upon a rational basis."

On remand, following this Court's decision in *WMCA, Inc.* v. *Simon*, 202 F. Supp. 741 (S.D. N.Y., 1962), vacated and remanded, 370 U.S. 190, a three-judge District Court dismissed a complaint alleging invidious discrimination against residents of the urban and suburban areas of New York State, resulting from alleged malapportionment of representation in the New York State Senate and Assembly. *WMCA, Inc.* v. *Simon*, —— F. Supp. —— (S.D. N.Y., 1962), appeal docketed as No. 460, October Term, 1962. From the facts of the New York case, as appellants understand them, it appears that the ten most heavily populated counties of the State, containing roughly 73.5% of the 1960 population of New York, enjoy 65.5% of the Senate seats, and 62% of the Assembly seats.[19]

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[19] The New York appeal also raises questions regarding rulings of the lower court rejecting evidence offered by the appellants to prove a legislative intention to discriminate, issues that are not present in the instant case, where none of the material allegations of the bill of complaint have been contested (App. A, p. 62). So far as Senate representation is concerned, the maximum dilution in New York appears to be 4.9 to 1, as contrasted to the 33 to 1 maximum which exists in the case of Maryland's Senate.

The contradictory results arrived at in the lower courts accentuate the necessity for this Court to take up, and authoritatively decide, the pressing and important question of what are the minimum requirements of the Fourteenth Amendment when that article of freedom and fair play is invoked to support a claim of invidious discrimination in voting rights resulting from gross malapportionment of representation in one chamber or both houses of a State legislature. To this extent, appellants agree with the majority of the Maryland Court of Appeals, who, after reviewing some of the conflicting decisions in the lower courts, stated:

> "In any event, there is no unanimity of opinion to be drawn from the cases, and the final determination must await further light from the Supreme Court of the United States." [20]

C. The Constitutional Issues Were Erroneously Decided

Appellants contended in the Courts of Maryland that representation in the Maryland State Senate, where 14% of the population of the State hold a majority of the seats, produces an unconstitutional dilution or invidious discrimination with respect to the rights of suffrage of the eligible voters living in the more populous political subdivisions, in which may be found 76% of the population of the State. Alternatively, they argued that if population may be completely disregarded as a basis for representation in the Maryland State Senate, then the representation in the

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[20] App. A, p. 46. The majority opinion suggests that the decisions contrary to theirs may be explained on the basis that State constitutional provisions were violated in those instances (App. A, p. 46). This could not serve as a basis of distinction. It is elementary that a violation of a State constitutional provision neither necessarily establishes nor adds to a violation of the Federal Constitution. *Snowden* v. *Hughes*, 321 U.S. 1, 11.

General Assembly as a whole now afforded the residents of the more populous subdivisions creates a dilution of their voting rights in violation of the equal protection and due process clauses of the Fourteenth Amendment. The Court below has held to the contrary. It did so primarily on the ground that history and geography preserve the present representation in the Maryland State Senate from condemnation as invidious discrimination. For the most part, the majority attempt to support their conclusion by relying on what they regard as an analogy provided by the Federal Constitution. There, the House of Representatives is based exclusively on population, and the Senate on geography, or, more properly, on existence as a State.

Appellants will not belabor the arguments that refute the result reached below. Most of them are set forth in Chief Judge Brune's dissenting opinion, a copy of which is attached to this Statement and found in App. A, pp. 46-61. Suffice it to say that the Federal plan has not been followed in Maryland, at least since 1864, when the City of Baltimore was given three State Senators.[21] The increased Senate representation granted the City of Baltimore was confirmed by the Convention and Constitution of 1867.[22] Baltimore was given another Senator in 1900, when its proportion of the State's population had increased to 43%.[23] Finally, in 1922, the City of Baltimore, then possessing 51% of the State's population, was given two more State Senators.[24]

The justification for each increase in Baltimore's Senate representation was solely the fact of its expanding popula-

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[21] Debates of the Constitutional Convention of the State of Maryland Assembly at the City of Annapolis, Wednesday, April 27, 1864 (Annapolis: R. P. Bayly, 1864).

[22] Debates of the Maryland Constitutional Convention of 1867, compiled by Philip B. Perlman (Baltimore: Hepbron & Hayden, 1923), pp. 297-300.

[23] Bell, The Legislative Process in Maryland (U. of Md., 1958), p. 15.

[24] *Ibid.*

lation. Plainly, and contrary to the Court below, the population factor has been applied four times in the past in affording additional representation in the Maryland State Senate for Baltimore. That historical fact cannot be suppressed or overcome by any vague argument that Baltimore somehow is "unique." If the population principle is to be taken into account as a factor on which representation in a legislative body is based, then surely it must be applied on a rational basis; one urban area cannot be preferred over others merely because it happens to be a seaport of historical renown. This especially must be the case where the additional representation was given in recognition of the arguments advanced that it was its expanding population which entitled the City to increased representation.[25]

It is equally established in another fundamental respect, not discussed by the majority opinion below, that the Federal plan or system has not been adhered to in Maryland. Under the Federal Constitution, representation in the House of Representatives is based exclusively on population, except that each State is entitled to at least one Congressman. At the present time, only 5 out of 436 Congressional seats, or approximately 1%, fail to meet the minimum average population requirement. In Maryland, at least 33 additional seats, out of a total of 143 in the House of Delegates, or 23%, are allotted to the less populous subdivisions even though, were minimum population ratio requirements to be applied, the rural counties so favored would not be entitled to any of these 33 seats. Even with the temporary, stopgap legislation enacted at the May, 1962 special session of the Maryland General Assembly [26], it is indisputable that

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[25] See, e.g., *Baltimore Morning Sun*, Feb. 16, 1900, p. 4; *Baltimore Morning Sun*, March 16, 1920, p. 1.

[26] As previously noted, Art. 40, Sec. 42 of the Code of Md. (1962 Supp.) expires on January 1, 1966, unless supplanted by an amendment to the Maryland Constitution prior to that date.

representation in the lower House is not based on population, or even comes very close to being exclusively predicated on such a basis. The special legislation did not provide any population formula; it authorized only a specific increase in Delegate seats for certain counties and legislative districts Art. 40, Sec. 42, Code of Md. (1962 Supp.). Too plainly for argument, the Maryland House of Delegates still falls far short of a chamber in which representation is based on population.

Therefore, even if it could be fairly argued that the existence of a true Federal plan of representation in a unitary, non-Federal State satisfies the demands of the Fourteenth Amendment, that argument cannot be made with respect to Maryland, where nothing resembling a Federal plan has been followed since at least 1864. The argument which has been accepted by the Court below must of necessity be restated as the sophistical proposition that any bicameral arrangement in a State legislature, under which population is taken into some account in one chamber thereof, while in the other it is completely disregarded or applied on a capricious basis, constitutes a sufficient analogy to the Federal plan as to escape constitutional condemnation as invidious discrimination. If the analogy, thus pared down, suffices, and the proposition which the Maryland Court of Appeals has accepted as the law of this case prevails, then this Court's decision in *Baker* v. *Carr* was truly an exercise in futility. However, until the Court indicates that this is all that *Baker* represented, appellants will refuse to believe that the gross malapportionment of representation which now exists in the Maryland State Senate in particular, and in the Maryland General Assembly as a whole, complies with what the Fourteenth Amendment demands.

Since they do not believe it is necessary to deal with an issue which cannot fairly be said to exist in this case,

appellants shall not now state the many reasons why the alleged analogy of a Federal plan, even if such a plan actually had been observed historically in Maryland and was now the basis of representation in the General Assembly, would not save the existing representation provided for in the Maryland State Senate from censure under the Fourteenth Amendment. Chief Judge Brune's dissenting opinion deals extensively and, we believe, persuasively, with the several reasons why a Federal plan does not necessarily provide the equal protection guaranteed citizens against the States by virtue of Section 1 of the Fourteenth Amendment. In addition, a cogent, comprehensive, and completely dispositive answer to the argument based on the alleged precedent of the Federal plan may be found in Professor McKay's recent article, *Reapportionment and the Federal Analogy* (Nat'l. Munic. League: August, 1962). In brief, appellants will only note that while Article 1 of the Federal Constitution expressly guarantees inequality of the representative value of a citizen's vote, so far as concerns representation of sovereign States in the United States Senate, the Fourteenth Amendment, on the other hand, as interpreted by decisions of this Court, guarantees almost precisely the opposite with respect to the representation of non-sovereign counties, municipalities or legislative districts in State legislatures.

Finally, appellants do not think that it can be successfully maintained that one house of a State legislature must comply with the Fourteenth Amendment, while the other need not. An unreasonable dilution of a citizen's vote in either or in both chambers of a legislative body effectively frustrates the legislative process, giving rise to the invidious discrimination in rights of suffrage prohibited by the Fourteenth Amendment, and adverted to in the clearest terms by this Court in *Baker* v. *Carr*, 369 U.S. 186, 208. The Mary-

land Court of Appeals has erred in holding to the contrary, and on the basis of a rationalization which neither past history nor present logic can support.

D. *Only Judicial Relief Can Assure Legislative Reapportionment.* One of the major assumptions which apparently deterred this Court from 1946 to 1962 from entering into what one former Justice labeled "the political thicket" of reapportionment was the notion that the judiciary was ill equipped to fashion effective relief against gross malapportionment. This misassumption, in turn, seems to have arisen out of an apprehension that the decisions and orders of courts in the area of legislative reapportionment might be ignored, circumvented, or even defied, by the legslatures involved. *Colgrove* v. *Green*, 328 U.S. 549, 553. These reservations have proven unfounded. Even prior to this Court's landmark decision in *Baker* v. *Carr*, 369 U.S. 186, court decisions in Michigan, Minnesota, Hawaii and New Jersey which voided existing malapportionment, or asserted jurisdiction to do so, were promptly followed by legislative action reapportioning representation.[37] Moreover, on at least four occasions prior to *Baker* v. *Carr*, Federal court orders had successfully required States to elect their Congressional delegations at large, a burden which induced prompt and more equitable redistricting. *Lewis, Legislative Apportionment in the Federal Courts*, 71 Harv. L.R. 1057, 1087 (1958).

Events occurring subsequent to *Baker* v. *Carr* confirm that any apprehensions that reapportionment decisions by the courts would be followed by legislative evasion or de-

[37] *Giddings* v. *Blacker*, 93 Mich. 1, 52 N.W. 944, 16 L.R.A. 402; *Magraw* v. *Donovan*, 159 F. Supp. 901, 163 F. Supp. 184, 177 F. Supp. 803 (D. Minn., 1958); *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220 (D. Hawaii, 1956); *Asbury Park Press, Inc.* v. *J. Russell Woolley*, 33 N.J. 1, 161 A. 2d 705, and see also, *New York Times*, February 2, 1961, pp. 1, 16.

fiance of such rulings were groundless. The Maryland experience, of course, provides the closest and perhaps most compelling case in point. Despite some irresponsible oratorical excursions at the May 25-31, 1962 special session of the Maryland legislature,[28] in the end, the rural legislators, constituting a majority of the Maryland General Assembly, joined in passing a reapportionment measure to take the place of the constitutional provision (Art. III, Sec. 5) which the trial court had struck down as being in violation of the Fourteenth Amendment.[29] The experience of other states has been much the same. Decisions of Federal courts, either voiding reapportionment legislation or asserting jurisdiction, in the States of Alabama,[30] Delaware,[31] Georgia,[32] Florida,[33] Tennessee,[34] and Wisconsin, all were followed by the passage of some reapportionment legislation on the part of the State legislatures concerned, even though, in the case of Wisconsin, the proposed legislation was vetoed by the Governor on the grounds that it was not enough.[35] In the elections scheduled for November, 1962, reapportionment referenda are on the ballot in ten states. *Washington Post & Times Herald*, October 15, 1962, p. A13.

On the other hand, while recent experience demonstrates that court rulings in the field of reapportionment will be honored, however reluctantly, by the legislative bodies

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[28] *Washington Evening Star*, May 29, 1962, p. A1; *Baltimore Morning Sun*, May 30, 1962, p. 36.

[29] *Washington Post & Times Herald*, June 1, 1962, p. A1.

[30] *New York Times*, July 14, 1962, p. 8.

[31] *Washington Post & Times Herald*, August 5, 1962, p. A7.

[32] *Toombs* v. *Fortson*, —— F. Supp. —— (N.D. Ga., September 5, 1962); *Washington Post & Times Herald*, October 14, 1962, p. A6.

[33] *New York Times*, August 13, 1962, p. 18C.

[34] *Baker* v. *Carr*, —— F. Supp. —— (M.D. Tenn., 1962).

[35] *New York Times*, July 21, 1962, p. 32M; *New York Times*, July 3, 1962, p. 1.

which they affect, it is equally established that in the absence of a controlling court decision, it is absolutely futile to anticipate that a legislature will reapportion itself in an equitable manner. A long time ago, a State court perceptively observed that it "would be idle and futile to . . . [seek relief from malapportionment through] . . . the voluntary action of the body that made it." *State* v. *Cunningham*, 81 Wisc. 440, 483, 51 N.W. 724. The representatives from the less populous areas have too great an advantage to relinquish voluntarily their unnatural position of political preference in the absence of any binding court determination holding that it is unconstitutional for them not to do so.[36]

The long history of futile attempts to reapportion the Maryland General Assembly prior to the decision of this Court in *Baker* v. *Carr*, *supra*, quickly followed by the first decision in this case by the Court of Appeals for Maryland and the trial court's determination of May 28, 1962 voiding representation in the House of Delegates, is additional and, we believe, convincing evidence that, the nature of man, the politician, being what it is, legislative reapportioning cannot reasonably be expected in the absence of a controlling and authoritative judicial decision making it clear that existing representation violates constitutional rights, but can be expected in the wake of such a decision. In contrast to the issue resolved in the school segregation decisions announced by this Court in 1954, in *Brown* v. *Board of Education*, 347 U.S. 483, legislative malapportionment is not a subject that has deep and almost unbreakable roots in the culture of a large segment of the American society.

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[36] *Short, States That Have Not Met Their Constitutional Requirements*, 17 Law and Contemp. Probs., 377, 381 (1952); *Schumacher, Reapportionment in Oregon*, 3 W. Pol. Q., 428 (1950).

Primarily, if not exclusively, it is only the rural legislators, not their less self-interested constituents, who can be expected to protest until the ultimate outcome. Unlike some of the difficult experiences which have accompanied lower court attempts to implement the school segregation decisions of this Court, there is absolutely no reason to expect, certainly not in Maryland, that an authoritative ruling of this Court, followed by implementing decrees of the Maryland Courts, will not be sufficient to induce the General Assembly of Maryland to perform its long neglected constitutional duty and to eliminate the invidious discrimination in rights of suffrage which is the direct consequence of the gross malapportionment which prevails in the Maryland State Senate in particular, as well as in the General Assembly as a whole. This Court, therefore, should not be deterred by any alleged lack of either equity or the capacity to fashion effective relief in the premises from granting this appeal and ultimately reversing the decision below.

Conclusion

For the reasons set forth above, this Court has jurisdiction of the appeal and the questions presented are substantial. Consequently, probable jurisdiction should be noted and this appeal set down for briefing and oral argument on the merits. Appellants also respectfully request that, should this Court note probable jurisdiction in the pending appeals filed in *WMCA, Inc.* v. *Simon*, No. 460, October Term, 1962, and in *Reynolds* v. *Sims*, No. 508, October Term, 1962, or grant the petition for certiorari which has been filed in *Beadle* v. *Scholle*, No. 517, October Term, 1962, the instant appeal be consolidated with those three cases, and all heard together by the Court, inasmuch as

they present analogous and important questions under the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

ALFRED L. SCANLAN,
9806 Singleton Drive,
Bethesda, Maryland.
JOHN B. WRIGHT,
12 Church Circle,
Annapolis, Maryland.
JOHNSON BOWIE,
County Office Building,
Towson, Maryland.
Attorneys for the Appellants.

SHEA & GARDNER,
734 15th Street, N.W.
Washington 5, D. C.
Of Counsel.

October 24, 1962.

APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

No. 140—Adv.

SEPTEMBER TERM, 1962

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, *et al.*

v.

J. MILLARD TAWES, GOVERNOR, *et al.*

Brune, C. J., Henderson, Hammond, Prescott, Horney, Marbury, Macgill, James (Specially assigned), JJ.

OPINION by HENDERSON, J.; BRUNE, C. J., PRESCOTT and MARBURY, JJ, dissent

Filed: September 25, 1962.

On July 23, 1962, we filed a per curiam order affirming a declaratory decree of the Circuit Court for Anne Arundel County that Article III, sec. 2 of the Maryland Constitution is valid and constitutional. We now state the reasons for our order.

This is the third time this case has been before this Court. On April 24, 1962, following the Supreme Court's ruling in *Baker* v. *Carr*, 369 U.S. 186, and its per curiam order in *Scholle* v. *Hare*, 369 U.S. 420, we reversed a decision of the Circuit Court for Anne Arundel County which had sustained the appellees' demurrers to the bill of complaint. We held, by a divided court, that the bill, alleging that the apportionment prescribed by the Maryland Constitution violated the Fourteenth Amendment to the United States Constitution, stated a justiciable cause of action cognizable in the State courts, and remanded the case in order that the chancellor might determine "whether or not an invidious discrimination does exist with respect to representation in either or both houses." *Md. Committee* v. *Tawes*,

228 Md. 412, 436. We also said that "inquiry into the rational basis for such apportionment seems to be called for."

On May 28, 1962, the chancellor, after argument but without hearing testimony, held on motion for summary judgment that the composition of the House of Delegates, prescribed by Article III, sec. 5 of the Maryland Constitution, violated the Fourteenth Amendment, in that the distribution of numerical voting strength in voting for members of the House of Delegates, accorded to voters in the four suburban and more populous counties, was arbitrary and unreasonable. He reserved decision as to the Senate.

The Governor promptly convened a special session of the General Assembly, which for the first time in the history of this State added nineteen Delegates to the House of Delegates, to be voted for in the 1962 elections, by "stop-gap" legislation rather than by proposing a constitutional amendment. A proposed constitutional amendment failed of passage. The appellants entered an appeal from the chancellor's order reserving decision as to the Senate and we remanded the case with directions that the chancellor decide the point. The present appeal is from that decision. No question is presented as to the validity of the "stop-gap" legislation or the reapportionment of the House of Delegates.

Article III, section 1 of the Maryland Constitution provides: "The Legislature shall consist of two distinct branches; a Senate, and a House of Delegates, and shall be styled the General Assembly of Maryland."

Art. III, sec. 2 provides: "The City of Baltimore shall be divided into six legislative districts as near as may be of equal population and of contiguous territory, and each of said legislative districts of Baltimore City, as they may from time to time be laid out, in accordance with the provisions hereof, and each county in the State, shall be entitled to one Senator, who shall be elected by the qualified voters of the said legislative districts of Baltimore City and of the counties of the State, respectively, and shall serve for four years from the date of his election."

Throughout the colonial period the upper house consisted of the Governor and Council, appointed by the proprietor, and modeled after the English House of Lords. They also sat as a provincial court and court of appeals from the county courts. See Bond, Court of Appeals of Maryland, p. 4 et seq. See also 1 McMahon, Historical View of the Government of Maryland (1831), p. 148. That they had a certain sectional distribution was fortuitous. While the House of Delegates was selected on a county basis (four from each) the councilors were selected from among the most eminent landowners and office holders, serving at the will of the Governor.[1] In the Constitution of 1776, Art. XV provided for a Senate to be elected by the vote of Delegates elected two from each county and one each from the City of Annapolis and Baltimore Town. At that time there were eight counties on the eastern shore and ten counties on the western shore. These electors were directed to elect six senators from residents of the eastern shore and nine senators from residents of the western shore, "men of the most wisdom, experience and virtue, above twenty-five years of age, residents of the state above three whole years next preceding the election, and having therein real and personal property above the value of one thousand pounds current money." See Niles, Maryland Constitutional Law, p. 5. By the amendment proposed by Chapter 197, Acts of 1836, and ratified in 1837, the Senate was reconstituted to consist of one senator from each county (of which there were then twenty by reason of the establishment of Allegany and Carroll Counties) and one from Baltimore City. The method of indirect election by an electoral college was abandoned. This distribution was continued in the Constitution of 1851, and so far as the counties are concerned, was continued in the Constitutions of 1864 and

[1] The last colonial legislature convened on March 23, 1774, and the twelve councilors present were: Benedict Calvert, John Ridout, John Beale Boardley, George Stewart, Daniel of St. Thomas Jenifer, Benjamin Ogle, Philip Thomas Lee, Richard Lee, William Hayward, Daniel Dulany (the Younger), William Fitzhugh and George Plater. Archives of Md. LXIV.

1867, and in subsequent amendments. The last county to be formed, Garrett, was erected in 1872. See 3 Scharf, History of Maryland, p. 778. From that date the counties have numbered twenty-three.

However, Baltimore City, which had achieved the status of a political subdivision independent of Baltimore County in 1851, was allotted three senators, one from each legislative district, in 1864 and this provision was continued in 1867. It received an additional legislative district and senator in 1900 and two more in 1922, subsequent to the annexation of portions of Baltimore County and Anne Arundel County by Chapter 82 of the Acts of 1918.

The counties of Maryland have always been an integral part of the state government. St. Mary's County was established in 1634 contemporaneous with the establishment of the proprietary government, probably on the model of the English shire, associated with the important office of sheriff. Scharf, *supra*, p. 124 et seq. Indeed, Kent County had been established by Claiborne before the landing of the Marylanders and he established New Kent County in Virginia after he was ousted from Maryland *vi et armis* by the Calverts. We have noted that there were eighteen counties at the time of the adoption of the Constitution of 1776. They have always possessed and retained distinct individualities, possibly because of the diversity of terrain and occupation. Baltimore County, the most populous in the State, still has no incorporated towns, and until the recent adoption of a charter form of government, was governed by three elected commissioners who exercised the executive functions, while most of the legislative functions were exercised by its representatives in the General Assembly. Baltimore City, having acquired the unique status of an independent political subdivision, has maintained its own local government, subject to control by the General Assembly, since 1867. Only two counties, Montgomery and Baltimore have adopted the charter form of government under Art. XI of the State Constitution. While it is true that the counties are not sovereign bodies, having only the status of municipal corporations, *Howard County*

v. *Matthews*, 146 Md. 553, 561, they have traditionally exercised wide governmental powers in the fields of education, welfare, police, taxation, roads, sanitation, health and the administration of justice, with a minimum of supervision by the State. In the diversity of their interests and their local autonomy, they are quite analogous to the states, in relation to the United States.

It is an interesting historical fact that the mode of selecting the members of the United States Senate adopted in 1789 was modeled, to a considerable extent, upon the Maryland Senate of 1776. In addressing the Constitutional Convention on August 145, 1787, Madison opposed a proposal that senators be paid by the states on the ground that it would tend to impair the stability and independence of the Senate, which, he remarked, "was formed on the model of that of Maryland." 4 The Writings of James Madison, edited by Caillard Hunt, G. B. Putnam's Sons (1903) p. 202. Again, in No. 63 of The Federalist Papers, Madison in answering a contention that a Senate appointed not immediately by the people, and for a term of six years, would acquire a dangerous preeminence in the government and finally transform it into a tyrannical aristocracy, stated that "the constitution of Maryland furnishes the most apposite example. The senate of that State is elected, as the Federal Senate will be, indirectly by the people, and for a term less by one year only, * * *. If the Federal Senate, therefore, really contained the danger which has been so loudly proclaimed, some symptoms at least of a like danger ought by this time to have been betrayed by the senate of Maryland; but no such symptoms have appeared. On the contrary * * * the Maryland constitution is daily deriving from the salutary operation of this part of it, a reputation in which it will probably not be rivalled by that of any State in the Union." The members of the Federal Senate continued to be elected by the state legislatures until th adoption of the Seventeenth Amendment in 1913. It is also interesting to note that when Maryland abandoned the selection of state senators by an electoral college in 1837, it adopted a provision for one senator from

each county and from Baltimore City, following the federal pattern of geographical representation in the upper house.

The question before is not whether such a provision is wise or unwise but simply whether, as alleged in the bill, membership in both houses of a bicameral legislature must "be based on, or reasonably related to, the present population" of the various political subdivisions of the State. Since the provision of one senator from each county has been repeatedly approved and incorporated in the Maryland Constitution by the people of Maryland, it cannot conceivably offend the Maryland Constitution. The sole claim is that it violates the equal protection clause of the Fourteenth Amendment.

Equal protection has been judicially equated to a prohibition against invidious discrimination. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489. Not every discrimination is invidious, nor will it be set aside "if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426 and cases cited. We think a complete justification for the election of state senators on a county basis is to be found in the historical precedents cited above. The idea of a bicameral legislature, with the upper branch selected on a territorial rather than a popular basis, was a familiar one in 1837 and it is familiar today. The very purpose of having two houses was that each would be a check upon the other, and prevent the passage of hasty and ill-conceived legislation. A different method of selection was essential to the bicameral plan. No more natural or logical basis could be suggested than that the viable and long established political subdivisions be accorded representation, as they had been in election of electors under the Constitution of 1776.

The bicameral concept is not one that has become obsolete with the passage of the years. It has been repeatedly recognized by Congress and the President, subsequent to the adoption of the Fourteenth Amendment, in approving the constitutions of states seeking admission to the Union. See *Coyle* v. *Smith*, 221 U.S. 559. In the most recent cases, Alaska and Hawaii, their Constitutions each contain pro-

visions for senatorial districts of marked inequality in popular representation. In Alaska one of the senators represents more than fifteen times as many voters as the other. Moreover, the constitutions of a majority of the states that ratified the Fourteenth Amendment contained provisions for an upper house based on a geographical distribution of senators, without reference to population. It can hardly be maintained that in voting for ratification they were, in effect, voting to invalidate their own state constitutions.

The appellants argue that the Federal Constitution furnishes neither analogy nor precedent for the composition of the Maryland Senate, on the ground that the states which adopted the Federal Constitution were sovereign bodies. The argument overlooks the fact that thirty-seven states were admitted to the Union after 1789, which were not and had never been sovereign bodies, with the possible exception of Texas. It also overlooks the fact that it was never suggested that senators vote by states. They were clearly members of a national congress, designed for the very purpose of achieving a greater stability and a stronger central government than under the Articles of Confederation. In any event, the consequence and effect upon voting rights are the same, whether the voter be voting for United States senator or state senator. We think it is hardly conceivable that a different principle would apply in the one case than in the other.

We are of course aware that the government of the United States, within its delegated powers, may possess rights not retained by the states. But where civil rights are concerned there is still truth in the ancient adage that what is sauce for the goose is sauce for the gander. When the Supreme Court held in *Brown* v. *Board of Education*, 347 U.S. 483, that the equal protection clause prohibited the states from maintaining racially segregated schools, it also held in *Bolling* v. *Sharpe*, 347 U.S. 497, decided the same day, that the Federal Government was likewise barred by the Fifth Amendment. The relation between the two amendments seems sufficiently close to negative a conclusion

that a provision like that for the Federal Senate, U.S. Const., Art. I, sec. 3, would be offensive to either.

The appellants argue, however, that the federal plan has not been followed in Maryland, since an exception has been made in the case of Baltimore City, which has been subdivided into six election districts and now has six senators. The argument proves too much. The fact that the original plan has been modified in one instance does not require that it be totally abandoned. There are reasons for a distinction. In 1864, when Baltimore City acquired three senators, the State was in the control of the Union Army and many of the southern sympathizers in southern Maryland and the eastern shore had been disfranchised. There were special reasons for the continuance of extra representation in 1867, in 1900, and again in 1920, when the population of Baltimore comprised fifty-one per cent of the population of the State. Baltimore, even prior to the Civil War, was a great seaport, an industrial center and the hub of commerce and communication. Despite the distrust for city governments, dominated around the turn of the century by "rings" and "bossism," it mustered enough political power to enlarge its representation. Until quite recently it has been under-represented in the House of Delegates as well as in the Senate, although the picture has changed with the population explosion in the suburban counties, and it is not far out of line. The instant case is a contest for political power between the larger and the smaller counties, and Baltimore City is not concerned. It may also be noted that there is no constitutional requirement of territorial uniformity under the Fourteenth Amendment. *Salsbury v. Maryland*, 346 U.S. 545; *Ocampo v. United States*, 234 U.S. 91.

We find nothing in the Supreme Court cases to support the appellants' claim of invalidity in the apportionment of the Maryland Senate. *Baker v. Carr, supra*, merely decided that a justiciable question was presented. The remand in *Scholle v. Hare, supra*, was for the express purpose of allowing the Michigan Court to give further consideration to the question presented in the light of *Baker v. Carr*. We

do not read into that remand any intimation as to how the case should be decided on the merits. Nor do we attach any significance to the similar remand in the New York case of *W.M.C.A., Inc.* v. *Simon*, 370 U.S. 190. Upon remand, the Michigan Court, by a vote of four to three, held that in "[t]he absence of any semblance of design or plan in the present senatorial districts," the state constitutional provision approved by the voters in 1952, was invalid. But Mr. Justice Stewart stayed the order for reapportionment, stating: "It is very clear the issues decided by the Michigan Supreme Court are new issues; ones that were not decided in *Baker* v. *Carr*." We think it is significant that Mr. Justice Stewart, concurring in the *Baker* case, said: "The Court does not say or imply that there is anything in the Federal Constitution 'to prevent a State, acting not irrationally, from choosing any electoral legislative structure it thinks best suited to the interests, temper, and customs of its people.' * * *.

"In *MacDougall* v. *Green*, 335 U.S. 281, the Court held that the Equal Protection Clause does not 'deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former.' * * *." We find no intimation in later Supreme Court cases that this is not still the law.

We think there is little to be gained from a review of cases in other states and in the lower federal courts. A typical statement is that of the Tennessee Court upon remand of *Baker* v. *Carr*. 31 L.W. 2003 (June 22, 1962): "[E]qual protection requires that * * * apportionment in at least one house shall be based, fully and in good faith, on numbers of qualified voters without regard to any other factor." See also *Sims* v. *Frink*, 30 L.W. 2512 (Ala.), *Toombs* v. *Fortson*, 30 L.W. 2605 (Ga.) (May 25, 1962) and *Caesar* v. *Williams*, 371 P.2d 241 (Ida.) rehearing denied May 8, 1962. In reading some of the decisions attention must be paid to whether the particular constitution requires representation based on population in both houses,

as some do. The action taken by state or lower federal courts, once the question of justiciability is conceded, may turn on the construction of the state constitution and not present a federal question at all. Such cases are readily distinguishable. In any event, there is no unanimity of opinion to be drawn from the cases, and the final determination must await further light from the Supreme Court of the United States.

IN THE COURT OF APPEALS OF MARYLAND

No. 140—Adv.

SEPTEMBER TERM, 1962

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, *et al.*,

v.

J. MILLARD TAWES, GOVERNOR, *et al.*

Brune, C. J., Henderson, Hammond, Prescott, Horney, Marbury, Macgill, James (Specially Assigned), JJ.

Dissenting Opinion by BRUNE, C. J., in which PRESCOTT and MARBURY, JJ. concur.

Filed: September 25, 1962.

BRUNE, C. J., with whom PRESCOTT and MARBURY, JJ. join, dissenting:[1]

The question on this appeal is fundamentally one of Federal constitutional law—the meaning and application of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States with regard to the apportionment of representation in the legislature of a State. That was also true on the first appeal, but the question as then presented was two-pronged and related to the

[1] But for the recent (and fortunately temporary) illness of Judge Prescott, who wrote the majority opinion on the first appeal in this case, this opinion would have been written by him.

apportionment of representation (a) in the House of Delegates and (b) in the Senate of the General Assembly of Maryland. As a result of legislation enacted after the first appeal, the present controversy is limited to the apportionment of representation in the State Senate. The trial court determined, following a second remand of the case, that if the House were properly apportioned (as he thought it had been by the Special Session of the General Assembly following the determination just prior to the Special Session that its then existing apportionment would not be sustainable as to the 1962 election), there was no need to reapportion representation in the Senate on any basis of population. He based his conclusion upon an analogy to the Federal system under which the House of Representatives is apportioned on the basis of population, but each of the States, regardless of population, has two members of the Senate. He accordingly dismissed the bill as to reapportionment of the Senate. By a per curiam order joined in by four of the seven judges this Court affirmed the order of dismissal. We dissented.

In the majority opinion on the first appeal, *Maryland Committee for Fair Representation* v. *Tawes*, 228 Md. 412, 180 A. 2d 656, we stated some familiar propositions which are equally apposite here: that the Constitution of the United States and laws made in pursuance thereof are parts of the supreme law of the land and are paramount to any contrary provisions of the Constitution or laws of this State, that this is so both under the Supremacy Clause of the Constitution of the United States and under Article 2 of the Maryland Declaration of Rights, the latter in effect writing into our State Constitution this limitation upon everything else therein expressed; and that interpretations of the Constitution of the United States by the Supreme Court of the United States are binding upon us. We believe that there is no dispute or difference between the members of this Court on those propositions. The last of them was recognized by the majority opinion on the first appeal (228 Md., at 418 and 428) and also by the dissenting opinion (228 Md., at 448). Our difference with the present majority is based upon our understanding of the effect of recent

decisions of the Supreme Court bearing upon the subject in hand.

The first of those cases is, of course, *Baker* v. *Carr*, 369 U. S. 186. It makes clear, we think, that the Equal Protection Clause of the Fourteenth Amendment does afford protection against the debasement or dilution of voting rights through State legislative apportionment of representation. The exact point at which such protection will be afforded in any specific case, it is true, is not determined in *Baker* v. *Carr*; nor, we think, could it well have been. The basis of the claim of the plaintiffs-appellants was discrimination through the debasement or dilution of their voting rights through the apportionment of representation in the Tennessee Legislature (both houses) without regard to population. The second proposition determined by the Supreme Court is thus stated (369 U.S., at 197-98, 82 S. Ct., at 699): "(b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief." And near the end of the opinion of the Court Mr. Justice Brennan further said (369 U.S., at 237, 82 S. Ct. at 720): "We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment."

We think it also clear both from what we have just quoted and from footnote 15 to the opinion of the Court in *Baker* that the right for which the appellants were entitled to seek protection and which might be found upon trial of the merits, to have been violated was a Federal constitutional right. Footnote 15 (369 U.S., at 195, 82 S. Ct., at 698) reads in part as follows: "The complaint, in addition to the claims under the Federal Constitution, also alleges rights and the General Assembly's duties, under the Tennessee Constitution. Since we hold that appellants have—if it develops at trial that the facts support the allegations—a cognizable federal constitutional cause of action resting in no degree on rights guaranteed or putatively guaranteed by the Tennessee Constitution, we do not consider, let alone enforce, rights under a State Constitution

which go further than the protections of the Fourteenth Amendment."

The majority opinion in the instant case appears to take a different view and to confuse the remedy with the right. In the last paragraph of the majority opinion cases in other States and in the lower Federal courts are dismissed with the comment that "there is little to be gained from a review of [such] cases." The opinion cites several of them decided since *Baker* and then goes on to say:

> "In reading some of the decisions attention must be paid to whether the particular constitution requires representation based on population in both houses, as some do. The action taken by state or lower federal courts, once the question of justiciability is conceded, may turn on the construction of the state constitution and not present a federal question at all."

Where compliance with State constitutional requirements will also vindicate the Federal right shown to have been infringed, a decree in accordance with State constitutional provisions is an obviously desirable form of remedy and the otherwise possibly very difficult problem of determining an appropriate remedy (a problem not solved by *Baker*) may become relatively simple. However, it remains clear under *Baker* that a Federal right exists quite independent of State constitutional provisions and is in no way dependent upon them for its enforcement through some appropriate remedy.

The second recent Supreme Court case which seems to us highly pertinent to the present controversy is *Scholle* v. *Hare*, 369 U. S. 429. That case involves an attack solely on the apportionment of the Michigan Senate. The Michigan House is apportioned about as closely as may be on a basis of population. This fact was certainly well known to the Supreme Court of the United States when it remanded the *Scholle* case to the Supreme Court of Michigan for further consideration in the light of *Baker* v. *Carr*, *supra*. It is difficult for us to imagine a clearer indication (short of an express statement) than is given by this remand that the mere fact that one house of a State legislature is ap-

portioned strictly in accordance with population does not immunize the apportionment of the other from attack under the Fourteenth Amendment on the ground that gross malapportionment of representation as regards population constitutes invidious discrimination.

In the majority opinion of this Court on the first appeal in this case we expressed the views (228 Md., at 433-34) that no precise and inflexible formula for representation is required or can be stated, that the State is allowed every reasonable latitude with regard thereto and that any discrimination which may exist therein will not be set aside if any state of facts reasonably may be conceived to justify it, and that "there is a strong implication in the *Baker* decision that there must be some reasonable relationship of population, or eligible voters, to representation in the General Assembly, if an apportionment is to escape the label of constitutionally-prohibited invidious discrimination." We adhere to those views and we think the remand of the *Scholle* case supports them. The remand of that case appears to us to have been for the purpose of having the Michigan Court determine whether or not there was a rational ground upon which to support the allocation of representation in the Michigan Senate, which rather clearly involved marked disparities in voting power between different senatorial districts as regards population. The maximum disparity in Michigan, we note, was approximately 15 to 1 as against a maximum disparity in Maryland of approximately 32 to 1. We think that the remand of the case of *W.M.C.A.* v. *Simon*, 370 U.S. 190, 82 S. Ct. 1234, for the court below (the United States District Court for the Southern District of New York) to be "the first to consider the merits of the federal constitutional claim, free from any doubts as to its justiciability and as to the merits of alleged arbitrary and invidious geographical discrimination" supports our interpretation of the purpose of the remand of the *Scholle* case. As we read the opinions filed in the Michigan Supreme Court following remand, the Court divided sharply on whether there was or was not a rational basis for the Michigan senatorial apportionment fixed by a constitutional amendment adopted in that State in 1952.

In at least one respect, which may be of some significance, the Michigan case differs from the situation in Maryland. There, at the same election at which the apportionment under attack in *Scholle* was adopted by a popular majority of approximately 300,000 votes, another proposed constitutional amendment which would have apportioned the Senate on the basis of population was defeated by a popular majority of approximately 500,000 votes.[2] No similar choice has ever been submitted to popular vote in Maryland. Despite this popular vote and against historical-geographical arguments and the analogy to the Federal system, a majority of four out of the seven members of the Michigan Supreme Court participating held the 1952 apportionment invalid. The case is now on appeal to the Supreme Court and the order of the Supreme Court of Michigan has been stayed by Mr. Justice Stewart.

The majority of this Court in the present case seems to accept tacitly, if not expressly, the view that if one house of the Maryland General Assembly (the Senate) may be apportioned on a basis which ignores disparities of population, the other house (the House of Delegates) must be apportioned with due regard to population, and assumes that the House of Delegates now is so apportioned. It is true that the apportionment of the House is not under attack on this appeal and no question with regard thereto is now before us. It is also true, however, that even as reapportioned by the May 1962 Special Session of the General Assembly, considerable disparities still exist in a number of instances, though previous disparities have been materially reduced. Reference to Appendix A appended hereto will show the past and present situations with regard to the House and also the situation with regard to the Senate, which has not changed. There is no such close relationship between population and representation as in the case of the Michigan House, or between registered voters and representation as is declared necessary by the Federal District Court in Ten-

[2] Cf. *W.M.C.A. v. Simon* on remand, 31 L.W. 2121, where a somewhat similar factor was one of several grounds upon which the existing New York apportionment was upheld.

nessee after remand of the *Baker* case. (31 L.W. 2003.). Surely, the present Maryland apportionment is not so closely related to population as is that of the House of Representatives of the Congress of the United States, In that respect the Federal analogy is far from perfect.

Nor is it perfect in other respects. We still believe that there is some difference between the relationship of the States and the National Government and that of the counties and the State Government. We do not deny that State sovereignty is not what it once was and is far less significent today than it was in 1787 or 1789. It is true, however, that the Constitution of the United States does offer the States with small populations (no matter when they may have become members of the Union) a guarantee against being deprived of equal representation in the Senate without their consent. Counties, at least in Maryland, remain creatures of the State and they have no such constitutional guarantee.

Also, we think that the appellants are right in contending that Maryland does not fully follow the Federal pattern in another respect. The majority attempts to minimize the departure from the rule of one senator per political subdivision made in the case of Baltimore City. With all due deference to our brothers' reading of local history, the fact seems to stand out that these concessions to Baltimore City were granted, albeit grudgingly, in recognition of Baltimore's relatively large population and economic importance. There is no corresponding provision in the Federal Constitution.

Strictly, as a matter of history, the pattern of one senator per county or comparable political subdivision was in force only from 1851 to 1864. From 1837 to 1851 Baltimore City, which was a part of Baltimore County, had one senator. Since 1864 it has had first three, later four, and since 1922, six. At the time of the last increase it had slightly over 50% of the population of the State, according to the 1920 census, with 6 senators out of 29 it had about 21% of the representation in the Senate. It seems hardly necessary to point out that none of the six legislative districts comprised in the City of Baltimore con-

stitutes a political subdivision of the State comparable to a county.

The majority attempts to bolster the Federal analogy by the argument that those who drafted the Fifth Amendment (many of whom had also participated in drafting the original Constitution) could not have thought that Due Process of Law guaranteed by the Fifth Amendment was infringed by the Equal Representation Clause applicable to the Senate, and then by first equating Due Process under the Fifth Amendment with Due Process under the Fourteenth (this equation being, we think, true) and by then further equating the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. This argument seems to us highly strained. We know of no basis, historical or otherwise, for thinking that the provision for the equal representation of the States in the Senate—a representation of which no State may be deprived without its consent—was or was intended to be amended, limited, or construed by the Fifth Amendment. We may further note that, although in many instances the Due Process and Equal Protection Clauses may overlap, these two Clauses are separately expressed in the Fourteenth Amendment and that they constitute limitations upon the States, not upon the Federal Government. A further, and we think in itself sufficient, answer to this contention is that *Baker* v. *Carr*, *supra*, rests squarely and expressly on the Equal Protection Clause and is the basis for the remand of *Scholle*.

The imperfections of the analogy to the Federal system are a relatively minor factor in the case, though the analogy itself is one of the main grounds upon which the majority relies. The other ground—and perhaps it really includes the Federal analogy ground—is that history furnishes a rational basis for geographical representation without regard to present glaring disparities in population between areas.

Up to a point, which it may be difficult to locate precisely, there is doubtless some merit to an argument based solely on history, but there must be a limit to its efficacy. A phrase with which all lawyers are familiar is the old

saying that the reason for something is historical rather than logical. How far can we go in adopting history as the guide for determining whether there is a rational basis for a patent discrimination? It is almost ironic that this malapportionment of representation to population in this case was (as well as is) worse in the Senate than in the House. Surely, the historical-geographical argument cannot be pushed to the logical extreme of contending that an uninhabited geographical area is entitled to representation in a legislative body. (We need not even stop to consider the problem of who would represent it.) Geography simply cannot be divorced from people as a basis for representation. How large must the population of a geographical political subdivision be in relation to that of other such subdivisions in order to afford a reasonable base for representation? We grant that no exact mathematical rule or guide should be attempted by this Court; but it seems to us that when the disparity in population reaches the point where it has no rational justification, the limit of permissible discrimination is passed. A disparity of 32 to 1, we think, does exceed the permissible limit. In votes for the election of Senators that disparity exists as between voters in Baltimore County and voters in Kent County. If there were no other comparable disparities, it might be of little significance; but there are other comparable disparities, as reference to the figures in Appendix A will show. Thus the disparity as between voters in Prince George's County and in Talbot County is approximately 16½ to 1, as between voters in Montgomery County and in Garrett County it is approximately 17½ to 1, and as between voters in Anne Arundel County and Queen Anne's County it is approximately 12½ to 1. The maximum disparity in *Scholle* was 15 to 1. Without multiplying comparisons of one county with another, the following composite figures (taken from Appendix B), in which representation in the Senate is divided roughly into thirds, will reveal the general disparity between the most populous subdivisions of the State and the less populous subdivisions:

Units	1960 Population	Approximate % of State Population	Approximate % of Senate
Four most populous Counties and Baltimore City (10 Senators)	2,336,409	75	34½
Ten least populous Counties (10 Senators)	214,930	7	34½
Nine intermediate Counties (9 Senators)	549,350	18	31

To carry comparisons a step further, the fifteen least populous counties can elect 15 of the 29 Senators. These 15 counties have a combined population of 450,160, or a little over 14% of the State's total population of 3,100,869. That is, approximately one-seventh of the population can elect a majority of the State Senate.

Further comment can scarcely add emphasis to the figures shown in the above table and in the paragraph immediately following it.

The supposed Federal analogy was at least as well known to the Supreme Court as to us, but it did not prevent remand for consideration on the merits of apportionment in the State Senate in *Baker*, in *Scholle*, or in *W.M.C.A.* We cannot think of any logical reason for remanding a case to a lower court for the consideration of a patently untenable ground of constitutional attack. Of the three cases just cited *Scholle* seems most pertinent on this matter. The majority opinion in the instant case seeks to avoid what we think is a necessary implication from the remand of *Scholle* on this point by saying that the Supreme Court did not decide the question. We think that what the Supreme Court has not decided is whether or not there is a rational basis for the Michigan senatorial apportionment.

We think that the majority of this Court dismisses rather too lightly decisions of the courts of other States or of lower Federal courts from a review of which it finds little to be gained. We think that on the whole these other recent cases seem to support our views rather than those of the majority. In general, they regard both houses of a State legislature as subject to a requirement that there shall be some reasonable relationship between population and rep-

resentation. This may be shown by a rational explanation of a departure from an exact ratio, and such an explanation will be more readily accepted as to one house if the other is exactly proportioned to population. Some, such as *Baker* v. *Carr, supra,* on remand (31 L.W. 2003) have deferred action as to one house if the other is almost exactly apportioned according to population.

The opinion of the United States District Court for the Middle District of Alabama, filed July 21, 1962, in *Sims* v. *Frink,* 205 F. Supp. 245, is carefully reasoned, and, in our estimation, supports the view that even exact, or almost exact, apportionment of one house in a State legislature in accordance with population does not entirely dispense with the need for some reasonable regard for population in the apportionment of the other. To like effect is another very recent Federal District Court decision (July 23, 1962) in the Southern District of Florida, in *Sobel* v. *Adams,* F. Supp. . See, however, the more recent opinion of that court, F. Supp. , also reported in the Miami Herald of September 6, 1962, upholding a proposed Florida constitutional amendment which affects both House and Senate, bringing apportionment of the former much more nearly in line with population, but permitting considerable disparities as to the Senate. It was held that population need not be "a major factor" in reapportionment of the Senate. The Supreme Court of Vermont (on July 20, 1962) in *Mikell* v. *Rousseau,* A. 2d , held the apportionment of the Senate of that State to be unconstitutional. A Kansas County District Court reached a like conclusion with regard to the Kansas legislature on July 27, 1962. A decision of the Court of Common Pleas of Dauphin County, Pennsylvania, cited by the appellees, expresses views in accord with what we regard as the general trend and simply defers action. It does not involve a final determination on the merits. Nor did *Caesar* v. *Williams,* 371 P. 2d 241 (Ida.), decided April 3, 1962, reach a final decision on the merits. In Colorado the State Supreme Court in *Stein* v. *General Assembly,* 31 L.W. 2075, deferred requiring action but a Federal District Court in *Lisco* v. *McNichols,* 31 L.W. 2107, shortened the time of deferment.

The United States District Court for the Middle District

of Tennessee, on remand of *Baker* v. *Carr, supra*, appears to have taken a view similar to ours that there should be an "equitable" basis of reapportionment of the Tennessee Senate, even though it need not be "fully related to voting strength." See also *Toombs* v. *Fortson*, 205 F. Supp. 248 (N.D., Ga.), 30 L.W. 2695, in which the District Court held that at least one house would have to be apportioned *strictly* on a population basis and did not decide whether both houses would have to be so apportioned.

A three-judge Federal District Court in Oklahoma has acted to bring about reapportionment of the legislature of that State. *Moss* v. *Burkhart*, F. Supp. , commented on in the "Judicial Highlights" section of the Federal Reporter Advance Sheets for July 9, 1962. Further action in that case (for which we presently have no F. Supp. citation) is reported in *Facts on File*, August 2-8, 1962, to have been taken on August 3, 1962.

In *Sweeney* v. *Notte*, A. 2d (R.I.), 31 L.W. 2060, the Supreme Court of Rhode Island, though holding that it could not take action to enforce its views in a reapportionment case said: "The Attorney General contends, and petitioners concede, that apportionment along geographical, county, municipal or urban versus rural lines does not necessarily constitute a denial of equal protection if the rationale of such methods can be justified. We are in full accord with such contention, but it is equally true that historical recourse to such apportionment formulae cannot be justified if it results in invidious discrimination. The dilution of the vote of a majority of electors to one fourth of that enjoyed by others is, in our opinion so unjust as to be invidiously discriminatory."

See also *Sanders* v. *Gray*, 203 F. Supp. 158 (N.D., Ga.), involving the Georgia primary election unit vote rule. Probable jurisdiction has been noted but an application to advance for argument was denied in that case, *sub nom.*, *Gray* v. *Sanders*, 370 U.S. 921, by the Supreme Court. That Court did not adopt the view of Mr. Justice Harlan that leave should be granted the appellants for a stay of the injunction issued by the District Court pending the determination of the appeal.

We also refer to the remarks of two University of Virginia political scientists, Messrs. Paul T. David and Ralph Eisenberg, at the recent annual convention of the American Political Science Association in Washington. They discussed the need for representation with reasonable regard to population in both houses of a state legislature and expressed views thereon, as reported in the Washington Post of September 6, 1962 (pp. 1 and A 8) in general accord with ours.

In the present case we think that the gross disparities which exist in relative voting power (and which are not even disputed, for they cannot be) cast upon the proponents of the existing apportionment the burden of showing a rational basis for such departures from any regard for population as a basis for representation. This burden, in our estimation, has not been met. Such provisions as we have here seem much more than are required to assure a proper diffusion of political restraint, to paraphrase the diffusion of political initiative spoken of in *MacDougall* v. *Green*, 335 U.S. 281, at 284. Neither the long continuance of disparities nor the magic phrase "Federal analogy" sems to us to furnish the rational basis for such disparities which is necessary to save them from constituting "invidious discriminations" under the Fourteenth Amendment, as we think that Amendment has been authoritatively interpreted by the Supreme Court in the cases above referred to and recently decided by that Court.

We, therefore, think that the decree of the Circuit Court should have been reversed.

APPENDIX A

Population and Representation in the General Assembly of Maryland

Unit	Population	House of Delegates Prior to 5/31/62 No. of Delegates	House of Delegates Prior to 5/31/62 No. Represented by Each Delegate	House of Delegates After 5/31/62 No. of Delegates	House of Delegates After 5/31/62 No. Represented by Each Delegate	Senate No. of Senators	Relative Values of Votes Per Cent (%) of Value of Vote to Statewide Average For Delegates Prior to 5/31/62	For Delegates After 5/31/62	For Senator
State as a Whole	3,100,689	123	25,210	142	21,837		100	100	100
Allegany	84,169	6	14,028	6	14,028	1	179	156	129
Anne Arundel	206,634	6	34,439	7	29,519	1	73	74	52
Baltimore	492,428	6	82,071	13	37,879	1	31	58	22
Calvert	15,826	2	7,913	2	7,913	1	319	276	675
Caroline	19,462	2	9,731	2	9,731	1	259	224	550
Carroll	52,785	4	13,196	4	13,196	1	491	165	203
Cecil	48,508	3	16,136	3	16,136	1	156	135	221
Charles	32,572	2	16,286	2	16,286	1	155	134	328
Dorchester	29,666	4	7,417	4	7,417	1	340	294	360
Frederick	71,930	6	11,988	6	11,988	1	210	183	149
Garrett	20,420	3	6,807	3	6,807	1	370	321	534
Harford	76,722	4	19,181	4	19,181	1	131	114	139
Howard	36,152	2	18,076	2	18,076	1	139	121	296

APPENDIX A (Continued)

Population and Representation in the General Assembly of Maryland

Unit	Population	House of Delegates Prior to 5/31/62 No. of Delegates	House of Delegates Prior to 5/31/62 No. Represented by Each Delegate	House of Delegates After 5/31/62 No. of Delegates	House of Delegates After 5/31/62 No. Represented by Each Delegate	Senate No. of Senators	Relative Values of Votes Per Cent (%) of Value of Vote to Statewide Average For Delegates Prior to 5/31/62	For Delegates After 5/31/62	For Senator
State as a Whole	3,100,689	123	25,210	142	21,837	29	100	100	100
Kent	15,481	2	7,741	2	7,741	1	325	282	691
Montgomery	340,928	6	56,821	10	34,093	1	44	64	32
Prince George's	357,395	6	59,566	10	35,740	1	42	61	30
Queen Anne's	16,569	2	8,285	2	8,285	1	304	264	644
St. Mary's	38,915	2	19,458	2	19,458	1	129	112	249
Somerset	19,623	3	6,541	3	6,541	1	385	334	545
Talbot	21,578	3	7,193	3	7,193	1	350	308	495
Washington	91,219	6	15,203	6	15,203	1	166	144	117
Wicomico	49,050	4	12,263	4	12,263	1	206	178	218
Worcester	23,733	3	7,911	3	7,911	1	319	276	450
Baltimore City	939,024	36	26,001**	39	24,001**	6	97**	91**	68**

*Average number, statewide, of persons represented by each of 29 Senators, 106,920.
**Citywide average without regard to inequalities between Legislative Districts.

Appendix B

Comparison of Representation in the Senate of Maryland of the City of Baltimore and the Four Most Populous Counties and of Other Counties

	1960 Population	Approximate % of Population of State	No. of Senators	Approximate % of Senate
Group 1				
Baltimore City and Four Most Populous Counties:				
Baltimore City	939,024	30.22	6	20.70
Baltimore County	492,428	15.88	1	3.45
Prince George's County	357,395	11.53	1	3.45
Montgomery County	340,928	10.99	1	3.45
Anne Arundel County	206,634	6.67	1	3.45
	2,336,409	75.29	10	34.50
Group 2				
Ten Least Populous Counties:				
Kent County	15,481	.50	1	3.45
Calvert County	15,826	.51	1	3.45
Queen Anne's County	16,569	.53	1	3.45
Caroline County	19,462	.63	1	3.45
Somerset County	19,623	.63	1	3.45
Garrett County	20,420	.66	1	3.45
Talbot County	21,578	.70	1	3.45
Worcester County	23,733	.77	1	3.45
Dorchester County	29,666	.96	1	3.45
Charles County	32,572	1.05	1	3.45
	214,930	6.94	10	34.50
Group 3				
9 Intermediate Population Counties:				
Howard County	36,852	1.17	1	3.45
St. Mary's County	38,915	1.26	1	3.45
Cecil County	48,408	1.56	1	3.45
Wicomico County	49,050	1.58	1	3.45
Carroll County	52,785	1.70	1	3.45
Frederick County	71,930	2.32	1	3.45
Harford County	76,722	2.48	1	3.45
Allegany County	84,169	2.71	1	3.45
Washington County	91,219	2.94	1	3.45
	549,350	17.72	9	31.05

IN THE COURT OF APPEALS OF MARYLAND

No. 140—Adv.

SEPTEMBER TERM, 1962

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, *et al.*,

v.

J. MILLARD TAWES, GOVERNOR, *et al.*

Brune, C. J., Henderson, Hammond, Prescott, Horney, Marbury, Macgill, James (specially assigned), JJ.

Dissenting Opinion by PRESCOTT and MARBURY, JJ.

Filed: September 25th, 1962.

PRESCOTT and MARBURY, JJ, separately dissenting:

As indicated therein, we fully concur in the able dissenting opinion of Chief Judge Brune. In addition, we deem it appropriate to call attention to the contrast between the conclusion reached by the present majority and what was said in the majority opinion on the first appeal in which two of the majority on the present appeal concurred.

Plaintiffs' bill of complaint alleges malapportionment in both the State Senate and the House of Delegates. The case first reached us after the trial court sustained demurrers to the bill. We reversed, stating that the Supreme Court had made "a strong implication in the *Baker* decision that there must be some reasonable relationship of population, or eligible voters, to representation in the General Assembly, if an apportionment is to escape the label of constitutionally-prohibited invidious discrimination." We then remanded the case with directions to the chancellor to determine whether representation in either or both Houses of the General Assembly was apportioned on a basis involving such discrimination. The chancellor found that the representation in the House was unconstitutionally malapportioned, but made no finding as to the

Senate. We again remanded for a decision as to the Senate. It is elementary that if the well-pleaded allegations of the bill failed to state a cause of action with reference to representation in the Senate, neither remand insofar as it concerned that branch of the Assembly was proper. Upon the remand no testimony whatever was taken. The defendants filed an answer in which they admitted substantially all of the allegations of the bill relating to malapportionment, but, even though the majority opinion stated what we quoted above, the defendants stated in their answer that "representation in the Maryland Senate need not be based on nor reasonably related to the present population of the Counties and Baltimore City [and the present majority opinion sustains this contention]." Essentially, the case reaches us now in the same posture as the first appeal, the only difference being that in the first appeal the demurrers admitted the well-pleaded allegations of the bill, and in the present appeal the answer admits them with minor and insignificant exceptions. On those facts which were held sufficient on the first appeal to state a cause of action as to the Senate as well as the House, the present majority now finds "nothing in the Supreme Court cases [no case on malapportionment has been decided by the Supreme Court since our first opinion] to support the appellants' claim of invalidity in the apportionment of the Maryland Senate."

APPENDIX B

(Filed May 24, 1962)

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

No. 13,920 EQUITY

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, *et al.*,

v.

J. MILLARD TAWES, GOVERNOR, *et al.*

OPINION

Question Presented

Does the present composition of the State Senate and/or the House of Delegates of Maryland as provided by Article 3, § 2 and 5 of the Maryland Constitution invidiously discriminate against the Petitioners and therefore violate the equal protection clause of the United States Constitution?

How Question Arises

The Bill of Complaint was filed in this Court on August 12th, 1960 by the Maryland Committee for Fair Representation (hereinafter called "Committee") and seven citizens, taxpayers and voters from Montgomery, Anne Arundel, Baltimore and Prince George's Counties (hereinafter called "large" or "suburban" Counties) and Baltimore City against the Governor of Maryland, Board of State Canvassers, Secretary of State, Comptroller of the Treasury, Attorney General, Treasurer, Clerk of the Court of Appeals of Maryland (being members of the State Board of Canvassers) and the Board of Election Supervisors of Anne Arundel County.

Briefly, it is contended that the present system of representation in the Maryland Legislature, whereby the voters of the four (4) suburban Counties and Baltimore City receive representation below that to which they would be

entitled if representation was based on population, whereby their right to vote is diluted in violation of the equal protection and due process clause of the Fourteenth Amendment.

In September, 1960, Demurrers were filed by the Defendants claiming, inter alia, that reapportionment is a political question and as such is not a justiciable controversy but rests with the discretion of the Legislature or the people. The Demurrers were argued on November 12, 1960. On February 21, 1961, this Court, under the then controlling decisions of the United States Supreme Court, dismissed the Bill of Complaint. This decision was duly appealed to the Court of Appeals of Maryland and argued before five of the Judges of that Court on October 17, 1961. On December 12, 1961, the case was re-argued before seven Judges.

On March 26, 1962, the Supreme Court of the United States in a somewhat similar case, arising from Tennessee, overruled the existing law and in extensive and separate Opinions of 96 pages (6 to 2 decision) held that the District Court possessed jurisdiction of the subject and that a justiciable cause of action was stated. (Baker v. Carr, 7 L. ed. 2d 663).

On April 25, 1962, the Court of Appeals of Maryland, following the decision of the Supreme Court, reversed the Decree of this Court, and remanded the cause for further proceedings. Judge Henderson filed a dissenting Opinion in which Judge Horney concurred.

Appellate Opinion

The Majority Opinion of the Maryland Court of Appeals, written by Judge Prescott, settles many questions raised in the Petition so that my present function is somewhat limited and narrow. Among other questions, the Appellate Court decided:

(a) That this Court has the power and duty to determine the important question raised by the Petition:

(b) That it is not possible or advisable to provide a precise and inflexible rule or formula for proper representation in the Legislature:

(c) Maryland Law does not require that representation be based upon a mathematical ratio or population or of eligible voters:

(d) That the tenure and terms of the present members of the General Assembly cannot be changed:

(e) That it would be illegal as suggested by the Petitioners to provide "at large" election of the members of the Legislature.

(f) That the Chancellor should not enjoin anyone at this time, but should retain jurisdiction so that he can grant injunctive relief before the November, 1962 General Election, should the situation then so justify.

(g) That the representation in the Legislature does not violate the Civil Rights Statutes, nor §2, Article XIV of the Maryland Constitution (1950) and Articles 1, 7 and 45 of the Maryland Declaration of Rights.

Chancellor's Hearing

Under the aforesaid Opinion of the Appellate Court, it is my function and duty to receive evidence and determine whether or not an invidious discrimination exists with respect to representation in either or both Houses.

The material allegations of fact in the Bill of Complaint and the exhibits attached thereto were admitted by the Defendants in their Answer. The Defendants denied opinion allegations, conclusions of law and certain inferences. Furthermore, they offered in evidence an official census return (Respondents' Ex. #1); State of Maryland registration figures as of October 1, 1960 (State's Ex. #"A"). State's Election returns for Governor, November 4, 1958 (State's Ex. #B). State Election returns for President of the United States, November 8, 1960 (State's Ex. #"C"). Moreover, in their Answer, Respondents repeatedly state that the combination of the four suburban Counties and Baltimore City create an artificial combination of political subdivisions which is both irrelevant and immaterial, and, in conclusion, request that the Bill of Complaint be dismissed with appropriate costs.

No oral testimony was offered by any of the parties but arguments were made and briefs submitted by the Solicitor

for the Petitioners, the Attorney General and his Deputy on behalf of Governor Tawes and the members of the State Board, Solicitor for the Board of Election Supervisors of Anne Arundel County, and Solicitors on behalf of several amicus curiae. A Motion for Summary Judgment was also filed on behalf of the Petitioners under Maryland Rule 610.

Basic Constitutional and Equitable Principles

1. First and foremost, it must be remembered as explained by Judge Prescott that the provisions of the Federal Constitution as interpreted by the Supreme Court of the United States are conclusive and constitute the Supreme Law of the entire Country. Wherefore, we find the following in both the Federal Constitution (Art. VI, § 2) and the Maryland Constitution (Art. 2, Declaration of Rights):

> "The Constitution of the United States, and the Laws made, or which shall be made, in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, are, and shall be the Supreme Law of the State; and the Judges of this State, and all the People of this State, are, and shall be bound thereby; anything in the Constitution or law of this State to the contrary notwithstanding."

2. That the Judiciary of this State has not only the authority but the duty to declare laws and enactments invalid when they transcend constitutional limits.

3. Every intendment must be resolved in favor of constitutionality and the burden of showing unconstitutionality is on the Petitioners.[1]

4. To declare a section of the State Constitution invalid, as being in violation of the Equal Protection clause of the Fourteenth Amendment, the fact of equality is not enough as the enactment must be arbitrary, unreasonable, oppressive or an unjust discrimination.[2]

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[1] *McGowan* v. *Md.*, 366 U.S. 420-426; *Johns Hopkins University* v. *Williams*, 199 Md. 382, 86 A2 899; *Norris* v. *Baltimore*, 172 Md. 667, 192 A. 531.

[2] *Pope* v. *Williams*, 98 Md. 59 56 A. 543-aff. 193 U.S. 621-48 L. ed. 87; 5 M.L.E., § 231-233 and cases cited therein.

5. History is recognized as a pertinent consideration in the making of a constitutional determination.[3]

6. Geography, to a lesser extent, is also recognized as a pertinent consideration in the making of a constitutional determination.[4]

Composition of State Senate and House of Delegates

With these principles in mind, let us consider whether or not the present composition of the Senate and/or the House of Delegates invidiously discriminates against the Petitioners.

Although different principles may be applied to answer the question regarding the Senate and the House, they should be considered together. This is because a different answer could be made if the Maryland General Assembly were unicameral with one of the compositions instead of bicameral with both compositions.

Counsel during their arguments stated that they knew of no precise formula to determine or define "invidious discrimination" in constitutional issues. Webster's Dictionary defines "invidious" as "tending to excite hatred, ill will or envy; likely to give offense; especially unjustly discriminating or repugnant."

In State of *Oklahoma* v. *Williamson*, 316 U. S. 535, 86 L. ed. 1655, the Supreme Court held that "when the law lays unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made a "discrimination" as invidious as if a particular race or nationality had been selected for oppressive treatment."

In determining whether there is invidious discrimination in this case, I believe that the extent of the disparity is important; also, whether the disparity between the Counties or Legislative Districts has any reasonable justification; whether the action of the State Legislature or the constitutional enactment is unjustly arbitrary and unreasonable,

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[3] Judge Prescott's Opinion, p. 23, citing *Frank* v. *Md.*, 359 U.S. 360 and illuminating footnote No. 11.

[4] Judge Prescott's Opinion, p. 23.

keeping in mind, at the same time, that identity of treatment is not required if the classification or disparity of voting rests on real and not feigned differences.

Justice Smith aptly said in his prevailing Opinion in the famous Michigan decision:[5]

> "The Constitution of the United States does not require, as we construe equal protection, that there be a precise mathematical correlation between the weights accorded votes. It does not demand the precision of a physicist. But it does demand that the voters' right to substantial equality not be subject to gross, or to wilful and deliberate, deprivation, and it is no more palatable to us that it be accomplished on a grand scale than through the petty larceny of the ward healer."

Likewise, Justice Kavanagh, in another prevailing opinion, on page 71, quoted from a Wisconsin case[6] to the effect that perfect exactness in the apportionment, according to number of inhabitants is neither required nor possible but that when the wide departure cannot possibly be justified by the exercise of any judgment or discretion on the part of the Legislature, its action is void.

In *MacDougall* v. *Green*, 335 U. S. 281, 98 L. ed. 3, 7, the Supreme Court in a per curiam Opinion, said:

> "... To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. Thus, the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view

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[5] *Scholle* v. *Hare*, 360 Mich. 1, 104 N.W.2 63, at p. 93, remanded by Supreme Court on April 23, 1962; 8 L. ed.2 1.

[6] *State* v. *Cunningham*; 81 Wisc. 440 at p. 484; 51 N.W. 724, 730.

of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States."

Article II, § 1 of the Constitution of Maryland provides:

"The Legislature shall consist of two distinct branches, a Senate and a House of Delegates, and shall be styled the General Assembly of Maryland."

In my opinion, the use of the word "distinct" in this Section means a substantial or material difference and not merely a slight difference in age eligibility as provided under § 9 of the same Article.

Section 2 is succinctly stated by Judge Prescott as follows:

"Section 2 provides, inter alia, that one State Senator shall be elected from each county and each of the six legislative districts of Baltimore City, by the qualified voters of their respective counties and legislative districts, and they shall serve for four years from the date of their election."

Section 5 is as follows:

"The membership of the House of Delegates shall consist of one hundred and twenty-three (123) Delegates apportioned as follows: Calvert, Caroline, Charles, Howard, Kent, Queen Anne's, and St. Mary's Counties, two Delegates each; Cecil, Garrett, Somerset, Talbot, and Worcester Counties, three Delegates each; Carroll, Dorchester, Harford, and Wicomico Counties, four Delegates each; Allegany, Anne Arundel, Baltimore, Frederick, Montgomery, Prince Georges, and Washington Counties, and each of the six legislative districts of Baltimore City, six Delegates each."

Section 6 of the same Article also provides:

> The members of the House of Delegates shall be elected by the qualified voters of the Counties, and the legislative districts of Baltimore City, respectively, to serve for four years from the day of their election."

The historic distinction between the two Houses in Maryland was fully explained in footnote 11 of the Appellate Court's Opinion, so will not be repeated. I feel, however, that one of the Houses (in Maryland, the Senate) can be constitutionally based upon area and geographical location regardless of population or eligible voters. Such an arrangement protects the minorities. It prevents hasty, although popular legislation at the time. It is based upon history and reason and helps to protect the republican form of government guaranteed to the States by Article IV, § 4 of the United States Constitution. It preserves the checks and balances in the State Government which has worked so well under the Federal. Moreover, there would be little advantage in having a bicameral legislature if the composition and qualifications of the members were similar.

It is true that the great men of the Constitutional Convention of 1787, after lengthy debate, reached a compromise by providing for proportional representation in the Lower House and an equal vote for the States, regardless of population in the Upper House.[7]

Admitting that the plan was a compromise, must it not be conceded that it produced the government under which our great Country has prospered for almost two hundred years?

I do not agree with Petitioners' argument that the States of the Union are sovereign in contrast to the Counties, which are but political divisions of the State. States have not been sovereign or independent since the close of the Revolution in 1783 and we cannot turn the clock back to make them so. State sovereignty is contrary to the modern philosophy and operation of government and diminishes with each passing year.

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[7] *Krause*, The United States, p. 454-459.

I am inclined to agree with the Defendants that the combination of the four suburban Counties and Baltimore City for purposes of comparison is artificial. There is no invidious discrimination against Baltimore City in the House and it has a distinct advantage over all the suburban Counties in the Senate.[8] Anne Arundel County seems to be on the border line but is rapidly growing. It may be pointed out that the inclusion of Baltimore City improperly magnifies the various tax receipts and distributions enumerated in Plaintiff's Exhibit #2.

The various examples of malapportionment or unfair distribution were discussed in my original opinion and by the Appellate Court, so will not be repeated.

Therefore, without prolonging the matter further and acting as Chancellor under equitable principles, I have no hesitancy in finding from the facts presented that the people of Baltimore, Prince Georges and Montgomery Counties are invidiously discriminated against under the existing law. It necessarily follows that Article III, § 5 of the Maryland Constitution must be declared unconstitutional and void as violating the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. In my opinion, the facts are insufficient to establish invidious discrimination against the people of Baltimore City. The question is close in Anne Arundel County, but as the equities must be weighed in favor of constitutionality, I find no invidious discrimination.

Although, for the reasons heretofore stated, I do not believe that § 2 of Article III is unconstitutional, I have decided not to make a determination of the question at this time. The Legislature, the Executive, and the People will have little respect for judicial decisions unless there is some finality in these decisions.

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[8] The applicability of the Federal System to the State of Maryland is of course weakened by the division of Baltimore City into legislative districts with six (6) Senators instead of one (1). Such an arrangement was probably thought necessary because of the unique position of the City at that time. I do not consider it feasible to discuss the question further at this time, except to note that Los Angeles, with a population of over five (5) million, had but one (1) State Senator.

An Order will therefore be signed in conformity with this Opinion and, as suggested by the Appellate Court.

1. Declaring that § 5 of Article III of the Constitution of Maryland and all of the previous provisions of the original Constitution of 1867 and Amendments thereto relating solely to the apportionment of membership of the House of Delegates insofar as it applies to the General Election of November, 1962, violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and inconsistent with Article 2 of the Declaration of Rights, and therefore null, void and of no effect in regards to said Election, said Declaration having no effect whatsoever upon the tenure and terms of the present members of the House of Delegates.

2. Declaring that the members of the General Assembly have the power, if and when called into Special Session by the Governor, and such action be deemed appropriate by it to enact a bill reapportioning its membership for purposes of the November, 1962 Election.

3. Declaring that the members of the General Assembly, if and when called into Special Session as aforesaid, are empowered in their discretion to propose a constitutional amendment providing for reapportionment.

4. Withholding injunctive relief at this time, but retaining jurisdiction in order that appropriate injunctive relief can be granted before the November, 1962 Election, should the situation at that time so justify.[9]

Solicitors for the respective parties may submit an appropriate Order in conformity with the above.

/s/ O. Bowie Duckett,
Judge.

[9] I regret that I have not had sufficient time to write a more enlightening Opinion on this important question. The outstanding ability and exhaustive research of many members of the judiciary and writers are amazing and worthy of the highest commendation. This difficult question is now up to the members of the Legislature who are expected to rise above their personal or local views and enact legislation beneficial to the welfare of our State as a whole. Less would be below the exalted standing of the Legislature, as the predominant branch of our Government.

(Filed: May 28, 1962)

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

No. 13,920 EQUITY

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, *et al.*

v.

J. MILLARD TAWES, GOVERNOR, *et al.*

DECREE

THIS CAUSE having been remanded for further proceedings in conformity with the Opinion of the Court of Appeals of Maryland, filed April 25, 1962 *(228 Md. 412)*, and having come on for hearing, Exhibits were filed, Solicitors heard, Briefs submitted and pleadings read and considered;

WHEREUPON, it is ORDERED this 28th day of May, 1962, by the Circuit Court for Anne Arundel County, sitting in Equity, and by authority of this Court for the reasons set forth in the Court's Opinion of May 24, 1962 (*Daily Record*, May 28, 1962), ADJUDGED, ORDERED and DECREED that:

(1) § 5 of Article III of the Constitution of Maryland, and all of the previous provisions of the original Constitution of 1867 and Amendments thereto relating solely to the apportionment of membership of the House of Delegates, in so far as they apply to the General Election of November, 1962, violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and inconsistent with Article 2 of the Declaration of Rights, be, and the same are hereby, declared null, void and of no effect in regards to said Election; said declaration having no effect whatsoever upon the tenure and terms of the present members of the House of Delegates.

(2) In regards to § 2 of Article III of the Constitution of Maryland, the Chancellor makes no finding at this time, but retains jurisdiction and reserves the right for a future Decree under established equitable practice.

(3) The members of the General Assembly in Special Session, and in any subsequent Session, have the power in their discretion to enact a bill reapportioning its membership for purposes of the November, 1962 Election.

(4) The members of the General Assembly in Special Session, and in any subsequent Session, are empowered likewise in their discretion to propose a constitutional amendment providing for reapportionment.

(5) Injunctive relief is hereby withheld at this time, the Chancellor retaining jurisdiction in order that appropriate relief can be granted before the November, 1962 Election, should the situation at that time so justify; costs to be paid equally by the respective parties.

O. Bowie Duckett,
Judge.

(Filed June 28, 1962)

In the Circuit Court for Anne Arundel County

No. 13,920 Equity

Maryland Committee for Fair Representation, *et al.*

v.

J. Millard Tawes, Governor, *et al.*

Supplemental Opinion

On June 8th, 1962, the Court of Appeals of Maryland remanded the above case to this Court with directions to enter a decree declaring Section 2 of Article III of the Maryland Constitution to be valid or invalid, as the Court may determine. This Court must therefore determine whether the Maryland Senate is a legal body.

Since the filing of my Opinion on May 24th, holding that apportionment in the House of Delegates was unconstitutional but making no determination as to the Senate, the General Assembly at the call of the Governor has met in Special Session and on May 31st, 1962 enacted reapportion-

ment legislation which added nineteen (19) members to the House of Delegates. It appears, therefore, and the Petitioners have conceded, that the Lower House has been legally reapportioned according to population. Wherefore, the present issue is much simpler than originally presented when neither House was apportioned on a population basis. The narrow issue now presented is whether that Section of the Maryland Constitution providing for area representation in the Senate is valid or invalid. Stating the question differently, does the Fourteenth Amendment, which guarantees equal protection, require that a State having one House of its Legislature fairly based on population, shall also base its other House on population?

Initially, it must be recognized that it is not the function or duty of a nisi prius court to protect its personal views by changing the law but should follow the existing law and legal precedents if possible. The Chancellor should not engage in judicial experimentation or void a section of the State Constitution unless clearly illegal. Inequality of representation is not enough for this Court to declare an enactment invalid. There must be unjust or invidous discrimination.[1]

Up to the present, it must be conceded that there is no authoritative decision holding that both Houses of a Legislature must be based on population. Just as recent as May 25th, Judge Tuttle, speaking for a three-Judge Court,[2] after stating that there is some basis for Plaintiff's contention, said:

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[1] While the Supreme Court of the United States, and to a lesser extent, the States' Supreme Courts, may alter existing law because of a change in conditions or a change in the viewpoint of society (sometimes called "following the election returns") this function is not one for a trial court. As vividly expressed by one of the greatest Judges of all times: "We have x x x no right as a presently inferior Court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant." Judge Learned Hand, *Spector Motor Serv.* v. *Walsh*, 139 F.2d 803, 823; also quoted *Spector Motor* v. *McLaughlin*, 323 U.S. 101, 89 L.ed. 100 and *Scholle* v. *Hare*, 104 N.W.2d 63, at p. 122. Likewise, as Judge Murrah said: "It is not the function of this Court to psychoanalyze the justices of the Supreme Court in order to devine the trend of decisions." (145 F.Supp. 541.)

[2] *Toombs* v. *Fortson*, U.S. Dist. Ct. N.D.Ga., 30 L. Week 2606.

"However that may be, we do not find any authoritative decision by the Supreme Court that causes us to require that in order to give the Plaintiff his constitutional rights the State Legislature must be constituted as two Houses, both of which are elected according to population."

The Solicitor General of the United States in discussing the effect of *Baker* v. *Carr* before the Tennessee Bar Association on June 8th, 1962, said in part:

"* * * In Baker v. Carr we also argued that the starting point in determining the constitutionality of any apportionment should be *per capita* equality of representation and that any serious departure from this standard is invalid unless shown to have a rational justification. Both points were largely based upon history, for history is a powerful influence in constitutional law. State constitutions reflect the extent to which the idea of equality of voting power is imbedded in our political heritage, as I indicated above. They also suggest some of the justifications for diverging from exact numerical equality—the claims of historically separate units such as towns and counties to have equal recognition, the desirability of distributing political power geographically, the need to prevent a single large city or two from dominating an entire State; in New Hampshire seats in the Senate are allocated in the ratio of direct taxes paid. I do not mean to suggest how the question should be decided, but it would not surprise me greatly if the Supreme Court were ultimately to hold that if seats in one branch of the legislature are apportioned in direct ratio to population, the allocation of seats in the upper branch may recognize historical, political and geographical subdivisions *provided that the departure from equal representation in proportion to the population is not too extreme.* But surely a very strong argument can also be made that there must be representation proportionate to population in at least one branch of the legislature. * * *"

Difficulties of the Problem

The combination of several factors makes the determination of this involved problem more difficult. Among these are:

(1) The important and far reaching problem, involving the control by one co-ordinate branch of the State Government over another, presents a most delicate question.[3]

(2) Until the recent pronouncement of *Baker* v. *Carr*,[4] the Court had considered the question "political" so there are few recognized precedents or guideposts to follow.

(3) The Supreme Court in *Baker* v. *Carr* laid down no rules as to what apportionment of representation satisfies the requirements of the Fourteenth Amendment.

(4) The long established reluctance of the judiciary (regardless of its power) to compel action on the part of the Legislature. In this regard, it may be noted that Judges are trained to interpret laws, not to propose or prepare legislation which function has heretofore been performed by the Legislature.

(5) Unlike many other States, Maryland does not provide for reapportioning the General Assembly or for basing the Senate's representation on population.

(6) The State of Maryland should be "allowed every reasonable latitude * * *, and any discrimination therein will not be set aside any state of facts reasonably may be conceived to justify it."[5]

(7) Controversies such as this were distinguished Appellate Judges of equal experience and ability reach different conclusions, not on the general law but on their individual beliefs, philosophies or background, tend to establish a government of men and not of law and therefore

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[3] *Comm.* v. *Tawes*, 228 Md. 412; 180 A.2d 656.

[4] 369 U.S. 186; 7 L.ed.2d 663.

[5] *Comm.* v. *Tawes*, 228 Md. 412, citing *McGowan* v. *Md.*, 366 U.S. 420, 426 (1961).

contrary to our concept of sound government, and in violation of Canon 20 of Judicial Ethics.[6]

Contentions Made

Several strong arguments have been made by the Petitioners in their written and oral arguments before this Court. Points of little merit have also been advanced. For example, the Petitioners state that maximum dilution of voting rights with respect to the Maryland State Senate reaches as high as 33 to 1, whereas in the Michigan case of *Scholle* v. *Hare*, the maximum dilution is 15 to 1. These figures mean very little as the maximum dilution in the United States Senate is 75 to 1. Regardless of this, it must be conceded that if representation in the Maryland Senate is based on population there exists invidious discrimination.

Petitioners also contend in their motion that in the United States Senate a majority of the population has a majority of the representation, which is not the case in the Maryland Senate. This statement is erroneous. According to the 1960 Census, the 26 less populated States have a population in round figures of 31 million, so these States with 17 per cent of the population have 52 per cent of the representation.

Sovereignty

Petitioners' main point is their contention that Maryland should not continue under the Federal Plan because of State sovereignty in contrast to the Counties which are

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[6] *Judicial Canon 20. "Influence of Decisions Upon the Development of the Law."*

"A judge should be mindful that his duty is the application of general law to particular instances, that ours is a government of law and not of men, and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him. Such action may become a precedent unsettling accepted principles and may have detrimental consequences beyond the immediate controversy. He should administer his office with a due regard to the integrity of the systems of the law itself, remembering that he is not a depository of arbitrary power, but a judge under the sanction of law."

but political divisions of the State. *Daly* v. *Morgan*, 69 Md. 460. My original Opinion to the contrary is stated to be radical. By the great weight of modern authority, States are not now possessed of true or external sovereignty.[7] They do possess internal sovereignty, or at least the right to many of the attributes of internal sovereignty, subject to restrictions imposed by or arising from the Federal Constitution.[8]

Sovereignty in its full sense imports the supreme, absolute and uncontrollable power, subject to no other state, nation or potentate on earth. While a state may still have some attributes of sovereignty, all must concede that they have been greatly diminished.[9]

Petitioners therefore contend that because of this so-called "state sovereignty," it is legal and reasonable to base the United States Senate on area alone, but that it is illegal and unreasonable to use the same factor in determining senate representation in Maryland.

Petitioners correctly argue that this Government was a result of a compromise and infer that a better government would have been established if it had not been for the smaller States.[10] Disregarding the fact that the people

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[7] *State* v. *Hyman*, 98 Md. 596, 613; *81 C.J.S.*, States, § 2, 858; *Comm.* v. *Hague*, 25 F. Supp. 127; modified on other grounds 101 F.2d 774; 307 U.S. 496.

[8] *Chrisholm* v. *Ga.*, 2 U.S. 419-455; 1 L.ed.440. *People* v. *Toole*, 86 Pa. 224; 35 Colo. 225. *Moore* v. *Smaw*, 17 Cal. 199-218; 79 Am.Dec. 123. *1 Blackstone*, Commentaries 241-242.

[9] The original thirteen States have not been truly sovereign and independent since the close of the Revolution. The Civil War settled finally and conclusively that the States are merely indispensable units of a single national sovereign. Developments since 1933 have greatly increased the dominance of the national government over state government. States cannot enter into contracts or compacts with other States without Federal permission. They may not deport undesirables found in their midst. The National Government now determines the planting acreage of crops and the conditions and prices in the marketing of milk. Many other examples of the ever increasing power of the National Government can be given. *Encyclopedia Britannica*, Vol. 2, United States of America, p. 764. *U.S.* v. *Morelock*, 124 F. Supp. 932.

[10] Many do not agree with the position taken by the Petitioners. James Madison, the father of the Constitutional Convention, was of the opinion

under this document have prospered for almost 200 years to become the greatest Country on earth, I cannot believe that the mere use of the word "sovereignty" can as a practical matter sustain the Federal System and invalidate the States. If the Petitioners do not believe in the federal or republican form of government but would prefer a pure democracy or town meeting system, they should say so directly and not masquerade under the guise of state sovereignty.

If our Federal System of checks and balances is good for the Nation, it likewise should be good for the States. While a State undoubtedly possesses more attributes of sovereignty than a Charter County, the difference is largely one of degree and of no practical importance in determining the validity and effectiveness of the system itself. It is merely a play on words to contend that the word "sovereignty" should determine the issue. The desired effect of preventing hasty and ill conceived legislation would be attained in the same manner and just as completely in the General Assembly of Maryland as it is in the Congress of the United States.

Legislative Districts

In my opinion, Petitioners' most impressive argument is that the State of Maryland abandoned the federal plan by dividing the City of Baltimore into legislative districts. As stated in original Opinion, the earlier change was probably due to the unique position of Baltimore City at that time. Not only was its population greater than the rest of the State combined, but the City is in quite an unique position due to the fact that it is an independent City or

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that there should be equality of men in the House and equality for the States in the Senate, by which means the citizens of the States would be represented both individually and collectively. Checks and balances to curb sudden impulses of mere majorities would thereby be attained.

Sixty years after the Constitutional Convention of 1787, John C. Calhoun paid the smaller States the following tribute: "It is owing mainly to [certain small States] that we have a Federal instead of a National (that is unitary) government—the best government instead of the worst and most intolerable."

County in itself. It is, therefore, not merely a part of several counties, which is usually the case of other large cities in this Country, such as New York City, for example. The concentrated masses in Baltimore were therefore given several Senators by dividing the City into legislative districts, which was similarly accomplished in the other large cities by being in several counties.

Petitioners also attempt to distinguish the Maryland and Federal Plan by stating in case of the United States, the Lower House is based strictly on population, while in Maryland, it is not. As a matter of fact, the House of Representatives is not based strictly on population because 5 of the least populated States are allocated 1 representative in Congress, even though not entitled under the population ratio. Indians who pay no taxes are also not counted.

Maryland's Position

The Government of the State of Maryland presents a different problem from that of many other States which have been considered by the Courts. Our State Constitution, contrary to that of others, makes no provision for reapportionment. Our Constitution expressly provides for two distinct branches of the General Assembly. Such required bicameralism presupposes two different and distinct representation bases for its construction and utilization.

So far as history or tradition is a controlling factor, Maryland stands in the forefront. The Senate of the United States itself was formed on the model of that of Maryland.[11]

Representation Based on Population

While representation in the Senate in a number of States is based on population, because of the constitutional requirements of those States, this factor is not universal. Other bases for apportionment are county, district, town and parish areas; male inhabitants, legal voters, direct taxes paid and restricted population by excluding service-

[11] *The Journal of the Constitutional Convention*, published by G. P. Putnam Sons, 1903, p. 202.

men, aliens and Indians. State senates vary in membership from 17 each in Delaware and Nevada to 67 in Minnesota.[12]

Conclusion

Briefly, the reasons given in the original Opinion that the Maryland Senate can be constitutionally based upon area and geographical location regardless of population, were:

(1) The system protects minorities and prevents hasty, although, popular, legislation at the time.

(2) It preserves checks and balances and the republican form of government.

(3) If is based on history, tradition and reason.

Nothing has transpired since this Decision to change my mind. Petitioners propose to increase the Senate by 14 members at this time.[13] Under this plan, it would again be necessary to increase the Senate upon an increase in population.

Increasing the size of a legislative body is generally not desirable. It sacrifices legislative efficiency and adds to the costs.[14] Petitioners have lately taken the position that if the Maryland Senate cannot be based strictly on population, it should be based partly on population and partly on

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[12] *The Book of the States*, 1960-61, pgs 31 54-58; *43 Mich. L. Rev.*, p. 1091-1112; *17 Law and Contemporary Problems*, pgs 253-469, (1952).

[13] Under this proposal, Baltimore City's representation in the Senate would be increased from 6 to 9; Baltimore County from 1 to 5; Prince George's and Montgomery Counties, each, from 1 to 4, and Anne Arundel County from 1 to 2, thereby increasing the total membership of the Senate from 29 to 43.

[14] If, because of changed conditions, the General Assembly decides that it should follow the Federal Plan strictly, it could reduce Baltimore City's membership in the Senate to 1 and continue a single Senator for each County. Another, and perhaps more feasible, plan properly related to population would be to reduce Baltimore City (pop. 940,000) to 4 Senators, then divide Baltimore County (pop. 492,000) into 2 legislative districts with a Senator for each and continue all other Counties for the present with one Senator. It could then be provided that when any County reached a population of approximately 500,000, it would likewise be entitled to two Senators. Projected population studies show that this would be attained by Montgomery and Prince George's Counties in 1970.

area. They further state that this modified or hybrid plan is beneficial as it prevents hasty legislation and permits a second look before a law is enacted. The plan is used in a number of States in compliance with their Constitutions, and is generally valid. I feel that this plan merely dilutes or diminishes the benefits obtained under the Maryland and Federal System and would change this State's established Government. It is a plan which Maryland has the power to adopt but which it cannot be compelled to do. Each of the States has the right to determine and establish their own system of representation, provided there is some reasonable ground of justification for this determination. In addition to population, factors such as area, history, geography and tradition have always been recognized as reasonable when applied to one house of a legislature. In my opinion, Article III, Section 2 of the Maryland Constitution is therefore valid and constitutional.

O. Bowie Duckett,
Judge.

(Filed: June 28, 1962)

In the Circuit Court for Anne Arundel County

No. 13,920 Equity

The Maryland Committee for Fair Representation, *et al.*,

v.

J. Millard Tawes, Governor, *et al.*

Decree

The above matter having come on for hearing, in compliance with the Order of the Court of Appeals dated June 8, 1962, counsel were heard, Memoranda submitted, and the Court, for the reasons set forth in its Supplemental Opinion, is of the opinion that Article III, Section 2 of the Constitution is valid.

WHEREUPON, it is, this 28th day of June, 1962, by the Circuit Court for Anne Arundel County, sitting in Equity, ADJUDGED, ORDERED and DECREED that Section 2 of Article III of the Constitution of the State of Maryland be, and the same is hereby, declared to be valid and constitutional; costs to be paid by the Petitioners.

O. BOWIE DUCKETT,
Judge.

APPENDIX C

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides that:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article III, Section 2, of the Maryland Constitution provides that:

> The City of Baltimore shall be divided into six legislative districts as near as may be of equal population and of contigous territory, and each of said legislative districts of Baltimore City, as they may from time to time be laid out, in accordance with the provisions hereof, and each county in the State, shall be entitled to one Senator, who shall be elected by the qualified voters of the said legislative districts of Baltimore City and of the counties of the State, respectively, and shall serve for four years from the date of his election, subject to the classification of Senators hereafter provided for.

Article III, Section 5, of the Maryland Constitution (now inoperative) provided that:

> Notwithstanding the provisions of Section 4 of this Article, the membership of the House of Delegates shall consist of one hundred and twenty-three (123) Delegates, apportioned as follows: Calvert, Caroline, Charles, Howard, Kent, Queen Anne's, and St. Mary's Counties, two Delegates each; Cecil, Garrett, Somerset, Talbot and Worcester Counties, three Delegates each;

Carroll, Dorchester, Hanford, and Wicomico Counties, four Delegates each; Allegany, Anne Arundel, Baltimore, Frederick, Montgomery, Prince Georges, and Washington Counties, and each of the six legislative districts of Baltimore City, six Delegates each.

Chapter 1, Acts of the Special Session, Maryland General Assembly, May, 1962, now Art. 40, Sec. 42, Code of Md. (1962 Supp.), reads as follows:

AN ACT to add a new Section 42 to Article 40 of the Annotated Code of Maryland (1957 Edition), title "General Assembly" to follow immediately after Section 41 thereof, and to be under the new sub-title "Apportionment", revising the provisions concerning the membership of the House of Delegates and the representation of the several political sub-divisions therein, making provision for the nomination and election of certain candidates for office in the House of Delegates, ~~MAKING AN EMERGENCY APPROPRIATION TO THE BOARD OF PUBLIC WORKS FROM THE GENERAL FUND SURPLUS OF THE STATE TREASURY FOR THE FISCAL YEAR ENDING JUNE 30, 1963, TO BE USED IN WHOLE OR IN PART BY THE BOARD OF PUBLIC WORKS TO PAY A PORTION OF THE COST OF SPECIAL PRIMARY ELECTIONS FOR THIS PURPOSE,~~ and relating generally to the membership and election of the members of the House of Delegates of Maryland ~~AND TO AN EMERGENCY APPROPRIATION FROM THE STATE TREASURY FOR THE PAYMENT OF A PORTION OF THE COST OF SPECIAL ELECTIONS UNDER THIS ACT.~~

SECTION 1. *Be it enacted by the General Assembly of Maryland*, That new Section 42 be and it is hereby added to Article 40 of the Annotated Code of Maryland (1957 Edition), title "General Assembly" to follow immediately after Section 41 thereof, and to be under the new sub-title "Apportionment", and to read as follows:

42.

(a) The membership of the House of Delegates shall consist of one hundred and twenty-three Delegates. Each county and each legislative district of Baltimore City shall have two Delegates as a minimum, making a total of fifty-eight (58) Delegates. The remaining sixty-five (65) Delegates shall be apportioned on a basis of relative population, as in this section provided.

(b) ~~After and based upon the final official publication of the Federal census of 1970, and after such publication of each decennial Federal census thereafter, there~~ THERE *shall be an apportionment of representation in the House of Delegates in the following manner: Within one year after the publication of each census the Governor by proclamation shall announce the population determined in the census for each county and for each legislative district of Baltimore City. If the Federal census does not determine the population by legislative districts in Baltimore City, the Governor shall estimate the population of the several legislative districts by using the Federal census figures for wards and blocks within the City, or if that method is impractical, then by such other reliable method as may be feasible; and the Governor's determination of the population of each legislative district shall be conclusive. In the proclamation the Governor also shall announce the number of Delegates to which each county and legislative district is entitled according to the formula and requirements contained in this section. At the time of the next regular election to the House of Delegates following such proclamation the number of Delegates specified in the proclamation shall be elected in the counties and legislative districts respectively. The apportionment above made shall continue until changed under the provisions of this section.*

(c) Each county and each legislative district of Baltimore City shall be entitled to the minimum representation in the House of Delegates provided for in sub-section (a) of this section. Additional representation, subject to a total of sixty-five (65) additional Delegates and based on the population of each county and each legislative district as

determined by each official decennial Federal census, shall be in accordance with the following formula:

~~*The total population of the State according to the census shall be divided by the number sixty-five (65). The resulting quotient, computed to the nearest whole number, is the unit of population necessary for an additional Delegate. The unit of population, as divisor, shall then be divided into the population of each county in the State and of each legislative district of Baltimore City which has a population in excess of the unit of population. Each county and legislative district shall receive an additional number of Delegates equal to the resulting quotient in each instance, dropping any fractional remainder. If the total number of Delegates so apportioned is fewer than one hundred and twenty-three (123), additional Delegates shall be awarded in descending order to those counties or legislative districts having the highest fractional share of a unit of population as a remainder after the last mentioned quotients have been computed, until the total of one hundred and twenty-three (123) Delegates is apportioned.*~~

THE TOTAL POPULATION OF THE STATE ACCORDING TO THE CENSUS SHALL BE DIVIDED BY THE NUMBER SIXTY-FIVE (65). THE RESULTING QUOTIENT, COMPUTED AS THE NEAREST WHOLE NUMBER, IS THE UNIT OF POPULATION NECESSARY FOR AN ADDITIONAL DELEGATE. THE UNIT OF POPULATION, AS DIVISOR, SHALL THEN BE DIVIDED INTO THE POPULATION OF EACH COUNTY IN THE STATE AND OF EACH LEGISLATIVE DISTRICT OF BALTIMORE CITY WHICH HAS A POPULATION IN EXCESS OF THE UNIT OF POPULATION. EACH COUNTY AND LEGISLATIVE DISTRICT SHALL RECEIVE AN ADDITIONAL NUMBER OF DELEGATES EQUAL TO THE RESULTING QUOTIENT IN EACH INSTANCE, DROPPING ANY FRACTIONAL REMAINDER. IF THE TOTAL NUMBER OF DELEGATES SO APPORTIONED IS FEWER THAN ONE HUNDRED AND TWENTY-THREE (123), ADDITIONAL DELEGATES SHALL BE

AWARDED IN DESCENDING ORDER TO THOSE COUNTIES OR LEGISLATIVE DISTRICTS HAVING THE HIGHEST FRACTIONAL SHARE OF A UNIT OF POPULATION AS A REMAINDER AFTER THE LAST MENTIONED QUOTIENTS HAVE BEEN COMPUTED, UNTIL THE TOTAL OF ONE HUNDRED AND TWENTY-THREE (123) DELEGATES IS APPORTIONED.

~~THE TOTAL POPULATION OF THE STATE ACCORDING TO THE CENSUS SHALL BE DIVIDED BY THE NUMBER ONE HUNDRED AND TWENTY-THREE (123). THE RESULTING QUOTIENT, TAKEN TO THE NEAREST FIGURE OF AN EVEN THOUSAND, IS THE UNIT OF POPULATION UNTIL A SIMILAR COMPUTATION IS MADE FOLLOWING THE NEXT CENSUS. THE UNIT OF POPULATION SHALL THEN BE DIVIDED INTO THE POPULATION OF EACH COUNTY IN THE STATE AND EACH LEGISLATIVE DISTRICT OF BALTIMORE CITY. EACH COUNTY AND LEGISLATIVE DISTRICT SHALL RECEIVE AN AGGREGATE NUMBER OF DELEGATES (WHICH INCLUDES ITS MINIMUM OF TWO DELEGATES) AS ITS POPULATION EXCEEDS THE NUMBER OF UNITS OF POPULATION LISTED IN THE FOLLOWING SCHEDULE:~~

~~WHEN THE POPULATION OF THE COUNTY OR LEGISLATIVE DISTRICT EXCEEDS THIS NUMBER OF UNITS OF POPULATION~~	~~THE COUNTY OR LEGISLATIVE DISTRICT IS ENTITLED TO THIS TOTAL NUMBER OF DELEGATES~~
~~ONE UNIT SUBDIVISIONS~~	
~~2~~	~~3~~
~~3~~	~~4~~

~~TWO UNIT SUB-DIVISIONS~~	
~~4~~	~~5~~
~~6~~	~~6~~
~~8~~	~~7~~
~~THREE UNIT SUB-DIVISIONS~~	
~~10~~	~~8~~
~~13~~	~~9~~
~~16~~	~~10~~
~~FOUR UNIT SUB-DIVISIONS~~	
~~19~~	~~11~~
~~23~~	~~12~~

~~ALSO, FOR EVERY FOUR ADDITIONAL UNITS OF POPULATION IN EXCESS OF TWENTY-THREE UNITS, THE COUNTY OR LEGISLATIVE DISTRICTS SHALL RECEIVE ONE ADDITIONAL DELEGATE.~~

~~IF THE TOTAL NUMBER OF ALL DELEGATES SO APPORTIONED IS FEWER THAN ONE HUNDRED AND TWENTY-THREE (123) DELEGATES, ADDITIONAL DELEGATES SHALL BE AWARDED IN DESCENDING ORDER TO THOSE COUNTIES OR LEGISLATIVE DISTRICTS HAVING MORE THAN ONE UNIT OF POPULATION AND HAVING THE HIGHEST FRACTIONAL SHARE OF A UNIT OF POPULATION AS A REMAINDER AFTER THE QUOTIENTS HAVE BEEN COMPUTED IN APPLYING THE TABULAR FORMULA ABOVE, UNTIL THE TOTAL OF ONE HUNDRED AND TWENTY-THREE (123) DELEGATES IS APPORTIONED.~~

~~IN COMPUTING THE "HIGHEST FRACTIONAL SHARE" OF A UNIT OF POPULATION, REMAINDERS FOR COUNTIES OR LEGISLATIVE DISTRICTS UNDER THE FOUR SUB-HEADINGS IN THE TABULAR FORMULA ABOVE SHALL BE~~

~~GIVEN WEIGHTED VALUES AS FOLLOWS: FOR COUNTIES AND LEGISLATIVE DISTRICTS WHICH ARE "ONE UNIT SUB-DIVISIONS," THE REMAINDER POPULATION SHALL BE MULTIPLIED BY FOUR; FOR COUNTIES AND LEGISLATIVE DISTRICTS WHICH ARE "TWO UNIT SUB-DIVISIONS," THE REMAINDER POPULATION SHALL BE MULTIPLIED BY THREE; FOR COUNTIES AND LEGISLATIVE DISTRICTS WHICH ARE "THREE UNIT SUB-DIVISIONS," THE REMAINDER POPULATION SHALL BE MULTIPLIED BY TWO; AND FOR COUNTIES AND LEGISLATIVE DISTRICTS WHICH ARE "FOUR UNIT SUB-DIVISIONS," THE REMAINDER POPULATION SHALL BE MULTIPLIED BY ONE. THESE WEIGHTED VALUES (AND NOT THE SIMPLE ARITHMETIC VALUES) THEN SHALL BE USED IN COMPUTING THE "HIGHEST FRACTIONAL SHARE" OF A UNIT OF POPULATION IN AWARDING ADDITIONAL DELEGATES AS REMAINDERS.~~

~~IF AFTER ALL THESE COMPUTATIONS THE TOTAL NUMBER OF ALL DELEGATES SO APPORTIONED IS FEWER THAN ONE HUNDRED AND TWENTY-THREE (123) DELEGATES, ADDITIONAL DELEGATES SHALL BE AWARDED IN DESCENDING ORDER OF POPULATION TO THOSE COUNTIES OR LEGISLATIVE DISTRICTS HAVING A POPULATION LESS THAN ONE UNIT OF POPULATION, UNTIL THE TOTAL OF ONE HUNDRED AND TWENTY-THREE (123) DELEGATES IS APPORTIONED.~~

(d) Not later than December 31, 1965, the Governor shall make the estimations of population and the proclamation required in subsection (b), based upon the Federal census of 1960. The primary and general elections for the House of Delegates during the year 1966 ~~AND THE YEAR 1970~~ *shall be for such number of Delegates in each county and legislative district as previously determined under the provisions of this sub-section; and this section is fully effective when the House of Delegates which is elected in November, 1966, has qualified and entered upon its term of office.*

(e) Notwithstanding anything to the contrary in sub-sections (a), (b), (c) and (d) of this section, during the four-year term of the House of Delegates which is elected to office in ~~November, 1962~~, AND FOR ANY ADDITIONAL PERIOD DURING WHICH THIS SECTION MAY BE EXTENDED *each county and legislative district as a minimum shall have the number of Delegates in the House of Delegates that it had on January 1, 1962. For those four years, the formula for membership in sub-section (c)* BASED UPON THE FEDERAL CENSUS OF 1960 *shall be applied as to those counties and legislative districts for which it provides an increase in representation, but the formula shall not be applied as to those counties and legislative districts for which it would provide a decrease in representation, or as to which it leaves representation unchanged.*

~~*(f) In accordance with the formula in sub-section (e), the number of additional memberships in the House of Delegates, for which nominations are to be made by the local central committees, is as follows: Anne Arundel County, 1; Baltimore County, 7; Montgomery County, 4; Prince George's County, 4; Third District of Baltimore City, 2; Fifth District of Baltimore City, 1.*~~

~~*(g) The local central committee of each party which was elected on May 15, 1962, in the several counties or legislative districts respectively, shall nominate persons as candidates for the House of Delegates for the additional memberships herein created. These nominations shall be made prior to August 1, 1962.*~~

(F) IN ACCORDANCE WITH THE FORMULA IN SUB-SECTION (C), THE NUMBER OF ADDITIONAL MEMBERSHIPS IN THE HOUSE OF DELEGATES, FOR WHICH NOMINATIONS ARE TO BE MADE BY THE LOCAL CENTRAL COMMITTEES, IS AS FOLLOWS: ANNE ARUNDEL COUNTY, 1; BALTIMORE COUNTY, 7; MONTGOMERY COUNTY, 4; PRINCE GEORGE'S COUNTY, 4; THIRD DISTRICT OF BALTIMORE CITY, 2; FIFTH DISTRICT OF BALTIMORE CITY, 1.

(G) THE LOCAL CENTRAL COMMITTEE OF EACH PARTY WHICH WAS ELECTED ON MAY 15, 1962, IN THE SEVERAL COUNTIES OR LEGISLATIVE DISTRICTS RESPECTIVELY, SHALL NOMINATE PERSONS AS CANDIDATES FOR THE HOUSE OF DELEGATES FOR THE ADDITIONAL MEMBERSHIPS HEREIN CREATED. THESE NOMINATIONS SHALL BE MADE PRIOR TO AUGUST 1, 1962.

~~(F) (I) IN THOSE COUNTIES AND LEGISLATIVE DISTRICTS FOR WHICH THERE IS AN INCREASE IN REPRESENTATION, A SPECIAL PRIMARY ELECTION, BUT ONLY FOR SUCH INCREASED REPRESENTATION IN THE HOUSE OF DELEGATES, SHALL BE CONDUCTED ON TUESDAY, JULY 17, 1962. CERTIFICATES OF CANDIDACY FOR THIS PRIMARY ELECTION SHALL BE FILED NOT LATER THAN MIDNIGHT ON MONDAY, JUNE 11, 1962. THE FINAL TIME TO WITHDRAW AS A CANDIDATE IS MIDNIGHT ON FRIDAY, JUNE 15, 1962. THIS ELECTION IS DECLARED TO BE A "PRIMARY ELECTIONS" WITH RESPECT TO PROVISIONS IN ARTICLE 33 OF THIS CODE, TITLE "ELECTIONS" WHICH CONCERNS THE REGISTRATION OF VOTERS.~~

~~(II) EXCEPT AS IN THIS SECTION OTHERWISE SPECIFICALLY PROVIDED, THE PROVISIONS OF SAID ARTICLE 33 CONCERNING THE REGISTRATION OF VOTERS AND THE CONDUCT OF PRIMARY ELECTIONS IN THIS STATE AND IN THE RESPECTIVE POLITICAL SUB-DIVISIONS OF THIS STATE APPLY WITHIN THE PARTICULAR POLITICAL SUB-DIVISIONS IN WHICH THE SPECIAL PRIMARY ELECTIONS ARE HELD.~~

~~(III) THE BOARD OF SUPERVISORS OF ELECTIONS IN EACH SUCH POLITICAL SUB-DIVISION, AND ALL OTHER OFFICIALS AND EMPLOYEES OF THIS STATE AND OF THE RESPECTIVE POLITICAL SUB-DIVISIONS, SHALL DO THOSE THINGS WHICH ARE NECESSARY AND PROPER TO AR-~~

~~RANGE FOR AND CONDUCT THESE SPECIAL PRIMARY ELECTIONS.~~

~~(IV) THERE IS APPROPRIATED TO THE BOARD OF PUBLIC WORKS, AS AN EMERGENCY APPROPRIATION FROM THE GENERAL FUND SURPLUS OF THE STATE TREASURY FOR THE FISCAL YEAR ENDING JUNE 30, 1962, THE SUM OF TWO HUNDRED THOUSAND DOLLARS ($200,000). THIS APPROPRIATION SHALL BE USED IN WHOLE OR IN PART BY THE BOARD OF PUBLIC WORKS FOR THE PAYMENT OF ONE-HALF OF THE COST OF THE SPECIAL ELECTION IN EACH OF THE SEVERAL COUNTIES AND LEGISLATIVE DISTRICTS IN WHICH UNDER THE PROVISIONS OF THIS SECTION CERTAIN ADDITIONAL CANDIDATES ARE TO BE NOMINATED FOR MEMBERSHIP IN THE HOUSE OF DELEGATES. IF ANY PORTION OF THIS APPROPRIATION IS NOT EXPENDED ON SEPTEMBER 30, 1962, IT SHALL REVERT TO THE GENERAL FUNDS OF THE STATE TREASURY.~~

~~*(G) (h) The nominees, in the respective numbers indicated in sub-section (f), shall be so declared. They shall become nominees for*~~

(H) THE NOMINEES, IN THE RESPECTIVE NUMBERS INDICATED IN SUB-SECTION (F), SHALL BE SO DECLARED. THEY SHALL BECOME NOMINEES FOR *the particular party and in the particular county or legislative district, for the purposes of the general election in the month of November, 1962, in all respects the same as nominees already selected by the primary election of May 15, 1962, for the particular party and in the particular county or legislative district. All nominees so nominated by the* ~~*local central committees*~~ ~~SPECIAL PRIMARY ELECTIONS PROVIDED FOR HEREIN~~ LOCAL CENTRAL COMMITTEES *who are elected to office at the general election in November, 1962, and who subsequently are sworn into office as members of the House of Delegates of Maryland, have all the powers, privileges and duties accorded generally to members of the House of Delegates.*

~~(H)~~ (I) ~~(i)~~ *Nothing in this section shall be construed or applied to change or in any manner to affect the party conventions held pursuant to Article 33 of the Annotated Code of Maryland, title "Elections," during the year 1962.*

~~(I)~~ (J) ~~(j)~~ *This section establishes the membership of the House of Delegates of Maryland until such time as it is superseded by an amendment for that purpose to the Constitution of Maryland. This section automatically and with no further action required by the General Assembly is repealed and no longer in force as of the effective date of such an amendment to the Constitution; except that such repeal does not affect the election, tenure, powers, privileges, and duties of any member of the House of Delegates in office at the time of the repeal, for the remainder of the term for which he has been elected.*

SEC. 2. *And be it further enacted,* That this Act shall take effect on June 1, 1962. IF THIS ACT HAS NOT ALREADY BEEN SUPERSEDED BY AN AMENDMENT TO THE CONSTITUTION OF MARYLAND UNDER THE PROVISIONS OF SUCH SUB-SECTION (J) HEREINABOVE, IT SHALL EXPIRE AUTOMATICALLY AND WITH NO FURTHER ACTION REQUIRED BY THE GENERAL ASSEMBLY OF MARYLAND ON JANUARY 1, 1966; PROVIDED, HOWEVER, THAT IF AT THE GENERAL ELECTION IN THE MONTH OF NOVEMBER 1964 THERE IS SUBMITTED TO THE VOTERS OF THE STATE OF MARYLAND A PROPOSED CONSTITUTIONAL AMENDMENT WHICH WOULD SO SUPERSEDE THE PROVISIONS OF THIS SECTION, AND IF AT THAT TIME THE VOTERS OF THE STATE OF MARYLAND REJECT AND DO NOT RATIFY THIS PROPOSED CONSTITUTIONAL AMENDMENT AND THE PROVISIONS OF THIS ACT SHALL EXPIRE AUTOMATICALLY AND WITH NO FURTHER ACTION REQUIRED BY THE GENERAL ASSEMBLY OF MARYLAND ON JANUARY 1, 1970. IN THE EVENT THERE IS SUCH AN AUTOMATIC REPEAL OF THIS SECTION EITHER IN 1966 OR 1970 AS PROVIDED HEREINABOVE, THE

MEMBERSHIP OF THE HOUSE OF DELEGATES OF MARYLAND THEREAFTER SHALL BE THE SAME AS IT WAS IN THE SEVERAL POLITICAL SUB-DIVISIONS AND IN ITS ENTIRETY ON JANUARY 1, 1962. NOTHING IN SUCH A REPEAL EITHER IN 1966 OR 1970 SHALL AFFECT THE ELECTION, TENURE, POWERS, PRIVILEGES, AND DUTIES OF ANY MEMBER OF THE HOUSE OF DELEGATES IN OFFICE AT THE TIME OF THE REPEAL FOR THE REMAINDER OF THE TERM FOR WHICH HE HAS BEEN ELECTED.

Approved May 31, 1962.

(4392-7)